volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

* * *

(7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

* * *

STATEMENT OF THE CASE

I. Overview

This is a 42 U.S.C. § 1983 suit with supplemental Michigan law claims that arise out of the City of Ferndale, Michigan jail suicide of Clark Bradley. After the district court denied summary judgment on the municipal and individual § 1983 claims and the supplemental Michigan gross negligence claims against the individual police officers, the individual officers appealed to the Sixth Circuit which reversed in a split decision. Petitioner asks this Court to grant certiorari to review the Sixth Circuit reversal with respect to the qualified immunity of Officer Paul Simpson and Lieutenant Thomas J. Thomson and the Michigan gross negligence claims against them. Alternatively, Petitioner seeks summary reversal as to those two Defendants and remand to the United States District Court for the Eastern District of Michigan for trial along with the remaining municipal claim against Ferndale.

Fifty-one year old Clark Bradley hung himself in the Ferndale jail, cell number 6, on January 22, 2000, less than

two hours after his arrest by Ferndale Police Officer Paul Simpson on an allegedly outstanding probation violation warrant from the Oakland County Michigan Sheriff's Department. Mr. Bradley was arrested on the street at about 7:35 p.m. with an open alcoholic beverage following receipt of a suspicious person complaint.

1. Deposition Testimony Of Respondent Simpson

Officer Simpson reported that Mr. Bradley told him at the booking that "he wished I had my gun on me so that he could attempt to grab it and then I would shoot him". He told the Officer in Charge, Respondent Thomson about the remark, and Thomson flagged the confinement sheet to indicate Bradley was possibly suicidal.

Simpson did not inquire further with Bradley about his suicide ideation. Simpson claimed that at the time he did not know that Ferndale's policy required that, for potentially suicidal prisoners, mattresses and blankets were to be removed from the cell where they were lodged. Simpson removed Bradley's money, wallet, belt and jacket, but not his clothes, and he gave Bradley two blankets when he locked him in cell 6.

Simpson did not know that suicidal prisoners were supposed to be monitored at least every 15 minutes, and he did not recall whether anyone instructed Dispatcher White or Cadet Crouse to monitor Bradley every fifteen minutes. Nor did Simpson know whether any crisis intervention assistance was called as the Ferndale policy requires. In short, while Simpson knew there was a policy for potential suicidal prisoners, he stated that before Mr. Bradley's death, he did not know what that policy was.

After Simpson placed Bradley in cell 6 he returned to patrol duty, but he was subsequently called back to the station to assist in resuscitation efforts when Bradley was found hanging some 36 minutes later.

2. Deposition Testimony Of Thomas Thomson

Thomas Thomson worked 21 years as a Ferndale police officer until he was dismissed by the Department on June 21, 2002. As a Lieutenant, he was the officer in charge of the jail facility on the night of Clark Bradley's death. Mr. Bradley had to be arrested because he was wanted by Oakland County on a non-bond warrant. Thomson heard Bradley make the comment "Why don't you just shoot me" at his booking. He also learned that Bradley claimed to have hepatitis C and possibly tuberculous. Based on department rules and regulations, he ordered Simpson to put Bradley in the biohazard cell, No. 6. He also tagged him as suicidal and had Dispatcher White send a message to Oakland County to pick Bradley up as soon as possible.

Once Bradley was placed in the cell, Thomas's only follow-up with him until Dispatcher Jason White notified him that Bradley had hung himself was "I believe I looked up at some point in time and saw Mr. Bradley laying on the bunk in his cell on one of our TV monitors." He was preoccupied by an ongoing barricaded gunman situation and has no recollection of looking at the monitor other than that one time.

Thomson said he had been trained on how to handle suicidal people, but he complained:

> "[Y]ou never really know who is suicidal and who isn't. That would be like somebody making a threat that they were going to kill

> someone, that doesn't necessarily mean that they're homicidal. It's very difficult to tell. Potentially any prisoner is suicidal, regardless of whether I recognize them as being that or they make statements to that effect or not."

Thomson said that even if he determined that someone was suicidal, he did not consider that the person needs medical or psychiatric treatment.

Thomson was aware that suicidal prisoners are supposed to be checked at the cell every 15 minutes. But, when asked what a Ferndale police lieutenant was supposed to do if he had a suicidal person in custody his response was, "It's been a longtime since I read the policy. I honestly can't [recall such training]. I don't know how to answer that." Bradley should "absolutely" have been checked every 15 minutes.

Even though he saw on the monitor that Simpson had given blankets to Mr. Bradley, Thomson never went back and took them away or checked on him until White told him Bradley had hung himself. Chief Kitchen and Captain Collins told Thomson that they blame him or hold him responsible for Mr. Bradley's death.

3. Deposition Testimony Of Jason White

The Ferndale dispatcher, Jason White, who took his orders from Lieutenant Thomson, booked Mr. Bradley and was aware of his peculiar behavior and the suicidal designation on his file. White never checked the cell 6 video monitor in the 36 minutes between Bradley being placed in the cell at 8:40 p.m. and when White actually physically checked the cell at 9:16 p.m. and found Bradley hanging.

4. The Supplemental Disclosure Of Expert Testimony Of Ken Katsaris

Plaintiff's police procedures expert, Ken Katsaris, reviewed all of the depositions and documents and his evaluation and opinions are summarized as follows:

"1. Clark Bradley was appropriately arrested and transported to the Ferndale Police Lockup for an outstanding warrant issued by Oakland County. Officer Paul Simpson, the City of Ferndale arresting officer, appropriately noted Bradley's intoxicated condition and that Bradley exhibited suicidal ideation when Bradley said to him "You should give me your gun so I could shoot myself" (Depo. pg. 31). Simpson said that this statement bothered him enough that he told Lt. Thomas Thomson what Bradley said (Depo. pg. 36). However, the arresting officer by policy is also to "encourage the prisoner to contact a friend or relative" (II.A.3.), which he did not. Unquestionably Officer Simpson was aware that Bradley exhibit suicidal ideation.

2. Lt. Thomas Thomson was aware of Bradley indicating suicide ideation. He even heard Bradley make the comment "Why don't you just shoot me? (Depo. pg. 17). While there are discrepancies between members of the Ferndale Police that were present at Bradley's booking about exactly what Bradley did say that indicated his suicide ideation, Thomson testified that the statements made by Bradley did make him suspicious that he was suicidal

(Depo. pg. 29). Knowing Bradley was marked with a sticker at booking indicating he is suicidal (Depo. pg. 42). Thomson said the sticker indicates that Bradley showed signs of depression or made statements of some type of self destructiveness (Depo. pg. 43). In reference to what Thomson said he heard Bradley say that made him suspicious that he was suicidal, Thomson said "if somebody were to make a statement such as 'why don't you just shoot me,' I could articulate that to be a suicidal statement." (Depo. pg. 47). Thomson further testifies that he does not dispute that, indeed, Officer Simpson had a discussion with he and Jason White about Bradley being suicidal (Depo. pg. 87).

* * *

3. [A]lthough Lt. Thomson did not put Bradley in the cell and did not initially know what Bradley was given in the way of mattress or blankets, (Depo. pg. 81), Thomson testified that "...at some point in time on the monitor, I saw that he had a blanket." (Depo. pg. 82). He further testified that he did not remove the blankets from Bradley (Depo. pg. 82). Considering that Thomson believed Bradley was suicidal, that he had him flagged as suicidal, and that the policies of the Ferndale Police specifically required removing blankets from suicidal prisoners, Thomson was recklessly disregarding a known risk of harm to Bradley. This egregious act alone of ignoring the policies because of a preoccupation with another police matter is an

act of deliberate indifference to Bradley's medical needs. This preoccupation with monitoring an on-going barricaded person was used as an excuse for his lack of attention and the shortage of personnel to attend to Bradley's suicidal condition. However, the recognition of and documentation of Bradley's known risk to himself cannot be excused so simply. Officer Simpson was available to be told to assist with removal of the mechanism of death (blankets, etc.), and both White and Crouse were available as well.

4. The lack of proper and required monitoring of Bradley was one of the specific reasons Bradley was able to complete his act of suicide. Lt. Thomson was specifically to flag suicidal prisoners for 15 minute checks (Depo. pg. 1), but, also testified that he was not taught to do anything else. He also testified that anybody reading the policy book would do 15 minute checks. However, Thomson did not see that these checks were carried out, and the specific person responsible for monitoring Bradley, Dispatcher White, did not even know that he was to monitor Bradley every 15 minutes. He understood that Bradley was to be monitored every hour. He testified he was not told to monitor Bradley every 15 minutes (Depo. pg. 71). In fact, even though he knew Bradley was suicidal from the arrest confinement sheet having a "Suicidal" sticker, placed by him (Depo. pg. 81-82), White testified he learned about Bradley's suicidal

indications only after Bradley died (Depo. pg. 71-72).

* * *

5. Lt. Thomson was not being asked to predict a suicide, but to recognize the suicide risk, then implement procedures to prevent it. He obviously recognized Bradley was at risk, he did absolutely nothing to prevent it, even when procedures such as providing a blanket to a suicide risk were violated. This failure was driven by both a deliberate indifference to obvious training on core responsibilities and policy failures which equally were the motivating force that culminated in Bradley's death.

II. The District Court Opinion

At the September 3, 2004 motion, counsel for the Ferndale Defendants acknowledged that suicide is a "serious medical condition," and, for purposes of the motion, conceded that "Mr. Bradley made some indications of an intent to commit suicide. Nonetheless, he asserted that there was no material issue of fact as to conscious disregard for Mr. Bradley's well-being and that, at worst, Defendants were negligent. With respect to the state law gross negligence claim, the Ferndale Defendants asserted that Mr. Bradley's "decision to hang himself was the [proximate] cause of his death."

Thomson's attorney argued that under Rellergert v Cape Girardeau County, 924 F.2d 794 (8th Cir. 1991) for the proposition that simply identifying Mr. Bradley as possibly

suicidal without doing anything more was sufficient to defeat the deliberate indifference claim as a matter of law. Thomson further argued that the fact that he violated Ferndale's policies for dealing with suicidal detainees did not establish a constitutional violation.

Plaintiff's counsel responded that Defendants knew Mr. Bradley was a suicide risk and then handed him the blanket that he used as the means to commit suicide and despite the video camera, they effectively turned their backs to him for 36 minutes while he carried out his suicide threat. As to Michigan gross negligence, Plaintiff's counsel asserted that a reasonable juror could conclude that handing Mr. Bradley the blanket he used to make his noose was the "but for" proximate cause of his suicide.

Responding to Defendants' rebuttal that the blankets were reasonably provided to Mr. Bradley "to provide warmth," the judge said that coupled with failing to monitor him:

> "Well, Counsel, technically your socks and belt have other functions, too, but we know th objects ar commonly used for people to commit suicide. So, why doesn't that argument at least create a genuine question of fact?"

On March 16, 2004, Judge Hood released her memorandum opinion and order denying summary judgment on qualified immunity to the individual Defendants (App. B at 52a). She also denied the Michigan gross negligence claims (App. B at 52a).

Specifically, as to Simpson, White and Crouse, the judge found that Plaintiff "submitted sufficient evidence to create a genuine issue of material fact as to whether Defendants acted

with deliberate indifference to the decedent's serious medical needs" because they "knew that the decedent might be suicidal," yet "[n]o one checked on the decedent after he was placed in the cell." Because "decedent was given blankets despite his known suicidal tendency," a jury could find "[t]hese actions may constitute a conscious disregard of the decedent's serious medical needs." After separately setting forth the facts with respect to Thomson, the court said that "[f]or the same reasons [ ], Plaintiff has submitted sufficient evidence to create a genuine issue of material fact as to whether Defendant Thomson's action or inaction was deliberate indifference to the decedent's serious medical needs."

With respect to Michigan gross negligence under MCL 691.1407 as to Simpson, White, Crouse and Thomson, Judge Hood held that "[b]ecause Defendants had knowledge of the decedent's suicidal tendency, their action or inaction may have been "the" proximate [cause] of the decedent's death because of the decedent's mental state at that time. Plaintiff may have been unable to help himself and Defendants could have prevented his death. The proximate cause issue is for the jury to decide and Plaintiff has submitted sufficient evidence to create a genuine issue of fact as to whether their action or inaction was grossly negligent under the circumstances."

III. The Split Court Of Appeals Opinion

The Sixth Circuit majority in an unpublished opinion by the Honorable Glen M. Williams, Senior District Judge for the Western District of Virginia, joined in by the Honorable Martha Daughtrey held that all four individual police officers Simpson, White, Crouse and Thomson were entitled to qualified immunity, and reversed the district court's denial of

summary judgment on the § 1983. The majority also held that the four police officers and Chief Kitchen were entitled to governmental immunity based upon MCL 691.1407(2).

Judge Damon J. Keith, concurred in the majority's dismissal of all claims against White and Crouse and the Michigan claim against Chief Kitchen. Judge Keith dissented with regard to Bradley's claims against Officer Simpson and Lieutenant Thomson for acts of § 1983 deliberate indifference and Michigan gross negligence.

Judge Keith stated that "a plain application of the deliberate indifference standards" from Farmer v Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) "affirms that Bradley has stated viable claims against Officer Simpson and Lieutenant Thomson." Criticizing the majority's conclusion that the subjective component of the Farmer test had not been satisfied, Judge Keith stated that "the evidence viewed in the light most favorable to Bradley, permits the jury to reasonably conclude that Officer Simpson and Lieutenant Thomson both perceived that Bradley posed a serious risk of harm to himself and that they disregarded that risk." Because the record evidence with respect to both Simpson and Thomson demonstrated that they recognized the risk and subsequently disregarded it, Simpson and Thomson each possessed a "'sufficiently culpable stated of mind.'"

With respect to the Michigan gross negligence claim, Judge Keith would have affirmed because they did not merely fail to act;" rather, their joint actions worsened Bradley's fate." Judge Keith also rejected the majority's holding that Simpson and Thomson were not "the proximate cause" of Bradley's death because "the one most immediate, efficient and direct cause of Bradley's death was his own act of hanging himself." Stating that he had found "no case holding

that a detainee's suicide can never result from the gross negligence of police officers," Judge Keith remarked that "If this were so, it would make no difference whether the officers had supplied this known suicidal detainee with blankets, as they did, or a noosed rope." Under the facts presented, Judge Keith stated that a jury could reasonably conclude that Simpson and Thomson "constituted the single, most immediate, efficient and direct cause of Bradley's death."

REASON FOR GRANTING THE PETITION

The federal appellate courts continue to inconsistently apply Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). Despite Johnson, plaintiffs like Petitioner Bradley are still left without recourse when the Court of Appeals engages in an unwarranted reexamination of the factual evidence to determine whether plaintiff has stated a claim. Such an examination merely cloaks a grant of jurisdiction, while purporting to examine the record to see if plaintiff stated a legal claim. Johnson, which has not provided the circuit courts with a consistent message, should be reexamined.

Further, Supreme Court Rule 10 identifies considerations employed by the court in deciding whether to exercise its discretion to grant ceriorari. One of these considerations is whether the Court of Appeals decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. That consideration is present here. The Sixth Circuit majority's decision represents a gross miscarriage of justice that warrants the Court's review. Even if the Court concludes that he issue raised by the Petition is not certworthy, the Court should

summarily reverse and remand for trial for the reasons set forth in Judge Keith's well reasoned dissent.

I. Viewed In The Light Most Favorable To Bradley, Her Claims Against Simpson And Thomson Under § 1983 And Michigan Gross Negligence Theories Are Cognizable For The Reasons Set Forth By The Sixth Circuit Dissent.

A. Law Applicable To § 1983 Qualified Immunity Claim

Denials of summary judgment on the basis of qualified immunity are categorized as collateral orders which are immediately appealable, so long as the appeal is confined to issues of law. Thus, while the Supreme Court held in Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) that the denial of 42 U.S.C. §1983 qualified immunity constitutes a final, appealable decision within the meaning of 28 U.S.C. §1291, the Court subsequently held in Johnson v. Jones, 515 U.S. 304, 319-320, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."

While appellate courts review the grant or denial of qualified immunity de novo, they must not weigh the facts other than to decide whether the plaintiff has presented sufficient evidence that, if true, could constitute deliberate indifference to the risk that Mr. Bradley would harm himself when presented with the opportunity. Comstock v. McCrary, 273 F.3d 693, 701, 710-11 (6th Cir. 2001), c.f.: Jacobs v. West Feliciana Sheriff's Dep't, 228 F.3d 388, 395-96 (5th

Cir. 2000)[finding that plaintiff had presented sufficient evidence for a jury to conclude that sheriff who knew that inmate was suicidal was deliberately indifferent to inmate, even though he "did not completely ignore [inmate's] suicidal condition," because he put inmate in cell with "tie-off points" and a blind spot].

As a detainee, under the Fourteenth Amendment, Mr. Bradley was entitled to at least the same protection against deliberate indifference to his basic needs as is available to convicted prisoners under the Eighth Amendment. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); Horn v. Madison County Fiscal Court, 22 F.3d 653, 660 (6th Cir. 1994). Under both the Eighth and Fourteenth Amendment standards, the claim has two components, one objective and one subjective. To satisfy the objective component, the plaintiff must allege that the medical need at issue is "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). To satisfy the subjective component, the plaintiff must allege facts which, if true, would show that the officials being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did draw the inference, and that they then disregarded that risk. Farmer, 511 U.S. at 837; Comstock v. McCrary, 273 F.3d 693, 702-703 (6th Cir. 2001).

Focusing on the second prong, in Farmer, the Supreme Court explained that deliberate indifference describes a state of mind more blameworthy than negligence and requires more than an ordinary lack of due care, but can be satisfied with less than acts or omissions with knowledge that harm will result. Id. at 835, 114 S.Ct. 1970. In Farmer, the Court adopted a subjective standard for determining whether an official acted or failed to act with deliberate indifference:

"the official must both be aware of facts from which the indifference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. 511 U.S. at 837. This standard requires conscious disregard for a substantial risk of serious harm. Id. 511 U.S. at 839; Brooks v. Celeste, 39 F.3d 125, 128 (6th Cir. 1994).

Whether a police officer or jailer acted with deliberate indifference to the serious medical needs of presents a mixed question of law and fact. Williams v Mehra, 186 F.3d 685, 690 (6th Cir. 1999). Plaintiff must therefore allege facts which, if true, would show that the police officer or jailer being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that they did in fact draw the inference, and that he then disregarded that risk. Farmer v Brennan, 511 U.S. at 837. Emphasizing the subjective nature of this inquiry, the Supreme Court has noted that 'an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.' Id. 511 U.S. at 838 (emphasis added). The requirement that the police officer or jailer would have subjectively perceived a risk of harm and then disregarded it is meant to prevent the constitutionalization of medical malpractice claims; thus, plaintiff must show more than negligence or the misdiagnosis of an ailment in order to establish deliberate indifference. See Estelle v Gamble, 429 U.S. 97, 106 (1976) ('[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.'); Farmer, 511 U.S. at 835 (noting that deliberate indifference 'describes a state of mine more blameworthy than negligence').

On the other hand, plaintiff need not show that the police officer or jailer acted 'for the very purpose of causing harm or with knowledge that harm will result.' Farmer, 511 U.S. at 835; see also Horn,22 F.3d at 660 ('Officials may be shown to deliberately indifferent to such serious needs without evidence of conscious intent to inflict pain.'). Instead, 'deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.' Farmer, 511 U.S. at 836.

Although plaintiff bears the onerous burden of proving the police officer's or jailer's subjective knowledge, this element is subject to proof by 'the usual ways.' Farmer, 511 U.S. at 842. Thus, the Supreme Court noted that it was permissible for reviewing courts to infer from circumstantial evidence that an official had the requisite knowledge. Id. 511 U.S. at 842. Moreover, the Supreme Court warned, an official may 'not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.' Id. 511 U.S. at 843 n. 8.

The majority in this case recognized that Bradley satisfied the objective component of the Farmer test, but the majority invaded the role of the factfinder and failed to view the evidence in the light most favorable to Bradley. Instead, the majority implied that Simpson and Thomson had to have known to an actual certainty that Mr. Bradley would harm himself. As set forth by Judge Keith's dissent and discussed in the next section, viewed in the requisite light most favorable to the non-moving party, the record evidence in this case demonstrates that Simpson and Thomson recognized the risk and yet subsequently disregarded it.

B. Petitioner Presented Sufficient Facts To Establish The Subjective Prong Of The Farmer Deliberate Indifference Test Because Simpson And Thomson Disregarded The Known Risk Of Suicide By Handing Bradley The Blankets And By Failing To Monitor Him While He Executed His Threat.

As Judge Keith's dissent recognized, viewed in the light most favorable to Petitioner, under the subjective component, a reasonable jury could infer that Simpson and Thomson each possessed a "sufficiently culpable state of mind under Farmer. Both Simpson and Thomson perceived that Bradley posed a serious risk of harm to himself, yet they disregarded that risk. Comstock v. McCrary, 273 F.3d 693, 703 (6th Cir. 2001) which in turn quoted Farmer, 511 U.S. at 835-836, Judge Keith stated:

> "[A] plaintiff need not show that the official acted 'for the very purpose of causing harm or with knowledge that harm will result.' ... Instead, 'deliberate indifferent to a substantial risk of serious harm to a prisoner is the equivalent of *recklessly* disregarding that risk'" (emphasis by Judge Keith, dissenting).

The crux of the applicable Petitioner-favorable facts are as follows. Simpson, White, Crouse and Thomson were all aware of Bradley's remark to Simpson that Simpson should just give Bradley his gun so that Bradley could shoot himself. They all knew that Thomson had tagged Bradley's booking card with a sticker indicating that he might be suicidal. Instead, they gave him the blankets in reckless disregard of a known risk of harm to Bradley.

Thomson knew what the City's policy was but did not see to it that he himself, or Simpson or White actually followed

the policies. As he freely admitted, Mr. Bradley should have "absolutely" been checked every 15 minutes. And, Thomson was aware of the no blankets policy and he knew that Simpson had given Bradley two blankets, yet he did nothing to remove them from the suicidal prisoner. Thomson clearly can be held deliberately indifferent where he did not see that the City's policies were carried out. As Petitioner's expert Ken Katsaris explained, Thomson was not being asked to predict a suicide, but instead he was asked, having properly recognized the suicide risk, to implement the City's established procedures to prevent it. The district court correctly held that a jury could find that this was deliberate indifference. The Sixth Circuit majority erred in reversing with respect to Simpson and Thomson.

The majority simply erred in their conclusion that Petitioner and the trial court relied too heavily on the individual Defendants' failure to follow Ferndale's internal policies. The majority failed to consider that the district judge was also confronted with a municipal policy claim that she was addressing in her opinion. Moreover, as reflected in the dissenting opinion, the district court clearly recognized and properly applied the Farmer subjective prong in concluding that a jury could find that Simpson and Thomson subjectively perceived facts from which they could draw an inference that their individual actions would increase the risk of Bradley's suicide, and that they ultimately acted in conscious disregard of that risk.

The majority also wrongly criticized the district court for giving too much weight to Mr. Katsaris's opinions. However, Petitioner submits that it is irrelevant that Mr. Katsaris stated to the district court that Simpson and Thomson acted with "deliberate indifference." While the expert would not be allowed to so opine to the factfinder, Petitioner submits

that the able district judge was easily able to place the expert's opinion in the proper summary judgment burden perspective on the ultimate issue.

The prevailing law is that the opinions of experts should be given weight in §1983 summary judgment cases. Dickerson v McClellan, 101 F.3d 1151, 1163-64 (6th Cir. 1996)[specifically citing plaintiffs' expert's opinion on objective unreasonableness of officer Stevens' actions in using excessive force]; Russo v City of Cincinnati, 953 F.2d 1036, 1046-47 (6th Cir. 1992) [opinions of police procedures experts in §1983 cases are to be given weight]; Yates v City of Cleveland, 941 F.2d 444, 446 (6th Cir. 1991). These facts fully support the district court's conclusion that a reasonable jury could find that Simpson and Thomson had subjective knowledge that Mr. Bradley posed a serious risk of harm to himself and they were deliberately indifferent in failing to take affirmative action to prevent this harm.

The Court should grant certiorari to consider this qualified immunity issue.

C. The Court Should Grant Certiorari To Consider Whether Petitioner's Evidence Against Simpson And Thomson Satisfied Her Burden Under Michigan's Gross Negligence Exception To Governmental Immunity.

The MCL 691.1407(2) "gross negligence" exception to governmental liability provides that an "employee" of a governmental agency is liable for his "gross negligence that is *the* proximate cause of the injury or damage" (emphasis added). "Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." It is true that the Michigan

Supreme Court in Robinson v. City of Detroit, 462 Mich. 439, 613 N.W.2d 307, 317 (2000) held that "the phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury."

Here, it is preposterous to assert that officers who are alleged to be grossly negligent for failing to protect a known suicidal detainee from himself can then escape liability because they are not *the* proximate cause when the suicidal detainee hangs himself. Under the circumstances, where the decedent cannot help himself because of mental illness or incapacity, it is implicit in the facts that the Defendant officers had a special relationship and duty that overrode any "proximate cause" claim because the detainee died by his own hand. See Hickey v. Zezulka, 439 Mich. 408, 438, 442-443, 487 N.W.2d 106 (1992).

As Judge Keith recognized in his dissent, no caselaw holds that a detainee's suicide is the sole proximate cause that extinguishes the gross negligence of police officers. The majority's holding in this case directly conflicts with enlightened decisions in the state and federal courts.

Cowan v. Doering, 545 A.2d 159, 163 (N.J. 1988) is the seminal case on the question of a suicide victim's contributory or comparative negligence in a custodial setting. In Cowan, the New Jersey Supreme Court refused to consider the defense of contributory negligence where Mrs. Cowan who was hospitalized after a Nembutal overdose sustained a severe back injury when she defenestrated from an ICU window and dropped twelve feet to the ground. The New Jersey Supreme Court held that the patient's duty of self-care was "subsumed" by the duty of the defendants to prevent harm, thus rendering the contributory negligence defense unavailable. Other cases in a hospital setting include McNamara v. Honeyman, 546

N.E.2d 139, 146 (Mass. 1989) [no comparative negligence where defendant's duty of care includes preventing the self-abuse or self-destructive acts that caused the plaintiff's injury] and Hunt v. King County, 481 P.2d 593, 598 (Wash. App. 1971) [rejecting contributory negligence/intervening cause, saying where hospital exercised custodial control over psychiatric patient, its scope of duty extended to the prevention of self-destructive acts that were reasonably foreseeable, whether the acts were intentional or negligent].

In the specific context of a jail, a prison, or juvenile lockup, Judge Easterbrook of the Seventh Circuit stated the rule most succinctly in a 42 USC §1983 case that involved a supplemental Indiana state law negligence claim. Myers v. County of Lake, Indiana, 30 F.3d 847, 853 (7th Cir. 1994). Citing with approval the Michigan Supreme Court's decision in Hickey v. Zezulka, supra, Judge Easterbrook said, "a duty to prevent someone from acting in a particular way logically cannot be defeated by the very action sought to be avoided." The Myers Court properly predicted Indiana law because four years later in Sauders v. County of Steuben, 693 N.E.2d 16, 20 (Ind. 1998), the Indiana Supreme Court, also citing Hickey with approval, agreed that the decedent's act of suicide could not be the basis for a finding of contributory negligence or incurred risk that would bar a plaintiff's claim for wrongful death of an inmate.

Likewise, in Sandborg v. Blue Earth County, 615 N.W.2d 61 (Minn. 2000), the Minnesota Supreme Court reversed where a jury instruction, under the doctrine of comparative fault, permitted the jury to find that decedent's failure to protect himself from self-inflicted harm negated the jail's special duty to protect the decedent from committing reasonably foreseeable self-inflicted harm. Explaining that by comparative fault, the Court meant not simply apportionment

of damages among separate tortfeasors, "but also the predicate finding of fault on the part of the tortfeasor (Sandborg), and causation," the Court held that "[t]he jailer-detainee relationship duty to protect against a known possibility of self-inflicted harm transfers entirely to the jailer, and comparing the fault of the detainee is therefore not appropriate." 615 N.W.2d at 62 n.3; 64. The en banc, unanimous Minnesota Supreme Court then quoted with approval the Restatement (Second) of Torts § 449, comment b (1965);

> The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. * * * *To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.* Id. at 65. (emphasis by Sandborg Court).

The Sandborg Court held that the jury may find that the actions taken constituted reasonable care under the circumstances, but that "where the jailer has a duty to protect a detainee from self-inflicted harm and fails to fulfill that duty, it does not make sense to offset the jailer's fault by comparing the decedent's fault for inflicting the harm that the jailer had the duty to prevent." Id.

Most recently, in Joseph v. State of Alaska, 26 P3d 459 (Alaska 2001), the Alaska Supreme Court reversed in the case of an intoxicated prisoner suicide where the verdict form mandated a defense verdict even if the suicide was reasonably foreseeable. As the majority explained:

> [A] reasonably foreseeable occurrence cannot be an intervening/superseding cause of the actor has a duty to prevent that occurrence. If his suicide was reasonably foreseeable to his jailer, Rudolph Joseph's conduct could not have been an intervening/superseding cause of his death, excusing the state's alleged negligent breach of the duty it owed him. In this context, an intervening/superseding cause analysis coincides with the duty analysis. Only if an intentional act of suicide was not reasonably foreseeable would it relieve the jailer of a duty to prevent that suicide. But in that event, the jailer would not have breached its duty to prevent the suicide. 26 P.3d at 471 (footnote omitted).

Accordingly, in Joseph, the Court again specifically cited Michigan's Hickey decision and held that intentional suicide was not a complete defense to the parents' claim that the State negligently failed to prevent the prisoner's reasonably foreseeable suicide.[1] Id. at 474.

Based on the better Michigan law and the decisions from other jurisdictions, it is clear that to apply Robinson's "the proximate cause" language in the manner that the Sixth

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[1] In further support of this proposition, Petitioner directs the Court to Cole v. Multnomah County, 592 P.2d 221, 223 (Or. App. 1979) ["the acts which plaintiff's mental illness allegedly caused him to commit were the very acts which defendants had a duty to prevent, and these same acts cannot, as a matter of law constitute contributory negligence."] See generally: Comment: Contributory Negligence in Medical Malpractice: Recent Application in the Context of the Suicidal Patient, 69 Miss. L.J. 925 (Winter 1999); Article: Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care, 76 Neb. L. Rev. 301 (1997).

Circuit majority did, would be to treat intentionality as a complete bar to a claim based on negligence that would run counter to Michigan's usual manner of analyzing tort liability. This would amount to a public policy determination that a jailer simply owes no duty of reasonable care under the circumstances. It would gut the concept of special relationships and heightened duty in a custodial setting.

Petitioner set forth facts and law to establish the Michigan gross negligence claim that avoids the governmental immunity defense with respect to Simpson and Thomson. The Court should grant certiorari to address the issue raised by Judge Keith's dissent.

II. If The Issue Raised Is Not Certworthy, The Court Should Nonetheless, In The Exercise Of Its Supervisory Power, Reverse And Remand For Trial Because The Sixth Circuit Majority Decision So Far Departed From The Accepted And Usual Course Of Judicial Proceedings That It Amounts To A Miscarriage Of Justice.

This petition highlights one of the continuing problems with immediate interlocutory review of the district court's qualified immunity rulings. Petitioner vigorously asserted to the Sixth Circuit panel that Respondents had not limited their appeals to "neat abstract issues of law" and had instead raised a host of factual issues. While the majority purported to disregard these factual arguments, it is abundantly clear that they actually weighed facts and simply drew different inferences from those facts than the trial court and failed to view the facts in a Petitioner-favorable light. See e.g. Judge Keith's dissent n 1 (App.A at 32a).

Accordingly, the Sixth Circuit decision with respect to Simpson and Thomson represents a gross miscarriage of justice that warrants at least a summary reversal. To properly effectuate the Congressional purpose of 42 U.S.C. § 1983 and to be true to this court's qualified immunity decisions, it is essential that Petitioner should have a trial before the constitutional factfinder that examines the liability of Simpson and Thomson.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, the Court should summarily reverse the qualified immunity based summary judgment and the summary judgment on the Michigan law claims with respect to Respondents Simpson and Thomson and remand to the United States District Court for the Eastern District of Michigan for trial.

Respectfully submitted,

GEOFFREY NELS FIEGER
REBECCA S. WALSH
VICTOR S. VALENTI
Counsel of Record
FIEGER, FIEGER, KENNEY &
JOHNSON, P.C.
19390 W. Ten Mile Road
Southfield, MI 48075
(248) 355-5555
(248) 355-5148 FAX

Counsel for Petitioners

Date: December 7, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-1465; 04-1474

[Filed September 8, 2005]

STEPHANIE BRADLEY, Personal Representative of the Estate of Clark Bradley, Deceased, Plaintiff-Appellee,	)
v.	)
CITY OF FERNDALE, et al., Defendants-Appellants,	)

OPINION

WILLIAMS, Senior District Judge. Defendants-Appellants, City of Ferndale, Chief Kitchen, Officer Paul Simpson, Dispatcher Jason White, Cadet Wesley Crouse and Lieutenant Thomas J. Thomson appeal the district court's denial of their motions for summary judgment as to the plaintiff-appellee's federal and state claims. The district court held that summary judgment was inappropriate because the plaintiff had submitted sufficient evidence to create a genuine issue of material fact as to whether the defendants were

deliberately indifferent to the decedent's serious medical needs. The district court further held that the plaintiff had submitted sufficient evidence to create a genuine issue of fact as to whether the defendants' actions were the proximate cause of Bradley's death. For the reasons set forth below, we REVERSE the decision of the district court denying the defendants' motions for summary judgment.

I. Background

On the night of January 22, 2000, the Ferndale Police Department was involved in a barricaded gunman situation at a Ferndale residence. (Joint Appendix, ("J.A"). at 336.) Due to the serious nature of the event, all available officers were committed to the scene. (J.A. at 336.) As a result of this commitment, Officer Paul Simpson, ("Simpson"), was the only officer available to patrol the city.[1] (J.A. at 336.) At approximately 7:53 p.m., Simpson responded to a suspicious persons report at 2047 Symes Street. (J.A. at 49.) As Simpson approached that address, he observed the decedent, Clark Bradley, ("Bradley"), wandering along the street with an open container of alcohol. (J.A. at 50.) Simpson pulled up along side of Bradley and began questioning him in order to determine whether he was the individual specified in the suspicious persons report. (J.A. at 49-50.) Simpson relayed Bradley's information to Dispatcher Jason White, ("White"), who entered it into the Law Enforcement Information Network Database. (J.A. at 50.) Upon entering his information into the system, the officers learned that Bradley

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[1] On the night in question, Simpson was not scheduled to report for duty until 11:00 p.m. Due to a shortage in manpower, however, Simpson reported for duty five hours early at 6:00 p.m. (J.A. at 49.)

was wanted on an outstanding bench warrant issued February 26, 1999, by the Oakland County Circuit Court. (J.A. at 50, 117.) Because the warrant was a "no-bond" warrant, Lieutenant Thomas J. Thomson, ("Thomson"), the officer in charge at the Ferndale Police Department, ordered Simpson to arrest Bradley and transport him to the station pending his transfer to the Oakland County Jail. (J.A. at 315-16.)

As Bradley was being processed at the Ferndale Police Station, he remarked to Simpson that Simpson should give him his gun so that he could shoot himself.[2] (J.A. at 51.) Although Simpson believed that Bradley had made the remark in jest, he reported it to Thomson, who had himself heard the remark. (J.A. at 51, 57, 334.) Thomson then asked Bradley if there was a problem, and Bradley responded sarcastically. (J.A. at 58.) White noted that Bradley smelled of alcohol and had trouble staying awake. (J.A. at 66.) During the booking process, the officers also learned that Bradley suffered from Hepatitis C. (J.A. at 57.) Based upon his medical condition and his remark to Simpson, Bradley's jail card was marked with a red sticker indicating the need to apply universal and suicide precautions during Bradley's detention. (J.A. at 52.)

At 8:35 p.m., Thompson notified the Oakland County Sheriff's Department that Bradley's pickup and transfer to the Oakland County Jail should be completed that night and could not be postponed until after the weekend as the County had requested. (J.A. at 123.) The request itself stated:

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[2] Although the exact wording of Bradley's statement is not known, the parties generally agree that the statement involved Bradley either shooting himself or being shot by Simpson. (J.A. at 51,57.)

> Would normally not have a problem holding until Monday, but htis (sic) prisoner is intoxicated, has Hepatitis C, and is suicidal, and we are in the middle of a barricaded gunman. If possible, we would appreciate it if you would pick him up as soon as you can, as we are very short personnel due to the situation. Please advise us what you are going to do.

(J.A. at 123.) The County Sheriff's Department later responded that it would take possession of Bradley by midnight that night. (J.A. at 120, 125.)

At 8:40 p.m., Bradley was placed in a biohazard cell at the Ferndale Police Station. (J.A. at 118.) Bradley was the only detainee in the jail at that time. (J.A. at 118.) Following standard booking procedures, Simpson removed Bradley's belt, money, wallet and jacket. (J.A. at 203.) Bradley was allowed to keep his shirt and pants and Simpson gave him two blankets. (J.A. at 203, 210, 322.) After placing Bradley in his cell, Simpson went back out on patrol, and White set a timer so that he would be reminded to check on Bradley in one hour. (J.A. at 52, 227.) After Simpson had left, White and Thomson returned to the dispatchers desk to continue monitoring the barricaded gunman situation. (J.A. at 229.)

At some point after placing Bradley in his cell, Thomson looked at the monitors and saw Bradley lying on his bunk with the blankets. (J.A. at 317-18.) At 9:16 p.m., 36 minutes after Bradley was placed in his cell, White performed a cell check and found Bradley lying unconscious on the cell floor with a blanket tied around his neck. (J.A. at 118, 229-30.) White called to Thomson who entered the cell and began administering CPR. (J.A. at 67.) White instructed Crouse to call an ambulance and to notify Simpson that he was to return

to the station immediately. (J.A. at 231.) Bradley was later pronounced dead from self-asphyxiation. (J.A. at 67.)

II. Procedural History

On July 19, 2002, Stephanie Bradley, ("plaintiff"), the personal representative of Bradley's estate, filed suit in the United States District Court for the Eastern District of Michigan against the defendants in both their individual and official capacities. (J.A. at 7.) The plaintiff alleged that the defendants acted with deliberate indifference to Bradley's known suicidal tendencies in violation of the Fourteenth Amendment. (J.A. at 13-16.) The plaintiff further alleged that the defendants' actions constituted gross negligence which was the proximate cause of Bradley's injuries. (J.A. at 11-12.) On June 3, 2003, the City of Ferndale, Chief Kitchen, Simpson, White and Crouse filed a Motion for Summary Judgment, asserting theories of qualified, absolute and governmental immunity. (J.A. at 19.) On June 5, 2003, Thomson, represented by separate counsel in this case, filed his own Motion for Summary Judgment based upon qualified and governmental immunity. (J.A. at 92.) On March 16, 2004, the district court granted the City of Ferndale's motion for summary judgment with regard to Bradley's state law gross negligence claims. (J.A. at 403.) The remaining defendants' motions for summary judgment were denied in their entirety. (J.A. at 396-405.) This appeal followed.

III. ANALYSIS

A. Plaintiffs § 1983 Claims

I. The Court's Jurisdiction

A district court's denial of qualified immunity is an appealable final decision under 28 U.S.C. § 1291, but only "to the extent that it turns on an issue of law." *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). "[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones,* 515 U.S. 304, 319-20, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). It is not fatal to the defendants' appeal that the district court based its holding on the existence of genuine issues of material fact, as "this court has recognized the standard articulated by the Supreme Court: '*regardless of the district court's reasons* for denying qualified immunity, we may exercise jurisdiction over the ... appeal to the extent it raises questions of law.'" *Williams v. Mehra,* 186 F.3d 685, 689-90 (6th Cir. 1999) (en banc) (quoting *Dickerson v. McClellan,* 101 F.3d 1151, 1157 (6th Cir. 1996)). Therefore, despite the label used by the district court, this court can consider whether "the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a *prima facie* violation of clear constitutional law." *Berryman v. Rieger,* 150 F.3d 561, 563 (6th Cir. 1998).

Because this court does not have appellate jurisdiction over factual issues, a defendant must "concede the most favorable view of the facts to the plaintiff for purposes of the appeal." *Berryman,* 150 F.3d at 563. In compliance with this

rule, the brief submitted by Simpson, White, Crouse and Chief Kitchen specifically noted that it is their position on appeal that "the facts as alleged by the Plaintiff are insufficient to establish deliberate indifference on the part of the Defendants." (Final Reply Brief Of Defendants/Appellants Chief Kitchen, Officer Paul Simpson, Dispatcher Jason White, And Cadet Crouse, ("Ferndale Defendants' Reply Brief) at 2.) Thus, the court may hear the Ferndale defendants' appeal.

With regard to the plaintiff's claims against Thomson, the court notes that Thomson continues to argue on appeal that Bradley's actions were not sufficient to put a reasonable person on notice that he was possibly suicidal. (Defendant-Appellant Thomson's Brief On Appeal, ("Thomson's Brief), at 18.) The plaintiff argues that because Thomson failed to concede the facts as alleged by the plaintiff, this court is deprived of jurisdiction. (Plaintiff-Appellee's Final Consolidated Brief On Appeal, ("Appellee's Brief), at 30.) This proposition is arguably supported by language in *Booher v. Northern Kentucky University Board of Regents,* 163 F.3d 395, 396-97 (6th Cir. 1999), and *Berryman v. Rieger,* 150 F.3d 561 (6th Cir. 1998). If, however, aside from the impermissible arguments regarding disputes of fact, the defendant also raises "the 'purely legal' question of 'whether the facts alleged ... support a claim of violation of clearly established law,"' *Berryman,* 150 F.3d at 562 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 528 n.9, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)), then there is an issue over which this court has jurisdiction. Therefore, this court can ignore Thomson's attempts to dispute the facts and, nonetheless, resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction. *See Phelps v. Coy,* 286 F.3d 295, 298-99 (6th Cir. 2002); *see also Beard v. Whitmore Lake Sch. Dist.,* 402 F.3d 598, 602 n. 5 (6th Cir. 2005).

2. Individual Liability Under 42 U.S.C. § 1983

To state a claim under 42 U.S.C. § 1983, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins,* 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). A government official performing discretionary functions is entitled to qualified immunity in his individual capacity if his conduct does not violate constitutional standards in light of clearly established law at the time of the alleged violation. *Barber v. City of Salem, Ohio,* 953 F.2d 232, 236 (6th Cir. 1992). "Qualified immunity is a government official's 'entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Such immunity is "'an expression of policy designed to aid in the effective functioning of government.'" *Scheuer v. Rhodes,* 416 U.S. 232, 242, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) (quoting *Barr v. Matteo,* 360 U.S. 564, 572-73, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959)). Implicit in the qualified immunity doctrine is a recognition that police officers, acting reasonably, may err. *Scheuer,* 416 U.S. at 242.

In *Saucier,* the Supreme Court established a two-part test for determining whether qualified immunity applies. *Saucier,* 533 U.S. at 201. In the initial inquiry, the court must consider "this threshold question: taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier,* 533 U.S. at 201. If the facts, as alleged by the plaintiff, fail to establish a violation, then immunity applies. *Saucier,* 533 U.S. at 201. On the other hand, if the alleged facts

sufficiently demonstrate a constitutional violation, we must determine "whether the right was clearly established." *Saucier,* 533 U.S. at 201. In making this determination, it is noted that the right claimed must be more than merely a generalized right; it must be clearly established in a particularized sense so that a reasonable official in the defendant's position knows that her actions violate that right. *Danese v. Asman,* 875 F.2d 1239, 1242 (6th Cir. 1989). Thus, we begin by identifying the contours of the substantive right allegedly violated. *County of Sacramento v. Lewis,* 523 U.S. 833, 842 n. 5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

When prison officials act with deliberate indifference to the serious medical needs of prisoners so that they inflict unnecessary pain or suffering, their actions violate the Eighth Amendment. *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Horn v. Madison County Fiscal Court,* 22 F.3d 653, 660 (6th Cir. 1994). Pretrial detainees enjoy analogous protection under the Fourteenth Amendment's Due Process Clause. *Bell v. Wolfish,* 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Horn,* 22 F.3d at 660.

Case law in this Circuit has established that psychological needs manifesting themselves in suicidal tendencies are serious medical needs for purposes of the due process analysis. *E.g., Horn,* 22 F.3d at 660; *Barber v. City of Salem, Ohio,* 953 F.2d 232, 239-40 (6th Cir. 1992) (identifying the proper inquiry in suicide cases as "whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs"); *Molton v. City of Cleveland,* 839 F.2d 240, 243 (6th Cir. 1988). Nonetheless,

there is no general right of pretrial detainees to be correctly screened for suicidal tendencies. *Danese,* 875 F.2d at 1244. Nor has this court recognized a generalized right of a prisoner to be protected against committing suicide. *Rich v. City of Mayfield Heights,* 955 F.2d 1092, 1096-97 (6th Cir. 1992). Against this background, the district court correctly concluded that the right at issue here is the detainee's right to reasonable protection against taking his own life *if* that detainee has demonstrated a strong likelihood that he will commit suicide.

To establish a violation of this right, the plaintiff must show that the decedent demonstrated a strong likelihood of taking his own life and that the defendants acted with deliberate indifference to that threat. *Barber v. City of Salem, Ohio,* 953 F.2d 232, 239-40 (6th Cir. 1992). Because we construe the facts in the light most favorable to the nonmoving party for purposes of summary judgment, we assume, as the district court did, that a jury could reasonably find that Bradley's statements and behavior demonstrated a strong likelihood of suicide. At issue then is whether the plaintiff presented evidence from which ajury could reasonably find that defendants responded to this threat with deliberate indifference.

In *Farmer v. Brennan,* 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), the Supreme Court explained the deliberate indifference standard in the context of an Eighth Amendment claim. The term describes a state of mind more blameworthy than negligence and requires more than an ordinary lack of due care, but can be satisfied with less than acts or omissions with knowledge that harm will result. *Farmer,* 511 U.S. at 835. In *Farmer,* the Court adopted a subjective standard for determining whether an official acted or failed to act with deliberate indifference: "the official must both be aware of facts from which the inference could be

drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 837. This standard requires conscious disregard for a substantial risk of serious harm. *Farmer,* 511 U.S. at 839; *Brooks v. Celeste,* 39 F.3d 125, 128 (6th Cir. 1994). Accordingly, when an official fails to act in the face of an obvious risk of which she should have known but did not, the official has not inflicted punishment in violation of the Eighth Amendment. *See Farmer,* 511 U.S. at 837-38.

Whether the defendants acted with deliberate indifference to the serious medical needs of Bradley presents a mixed question of law and fact, which this court reviews *de novo. Williams v. Mehra,* 186 F.3d 685, 690 (6th Cir. 1999). Under the *Farmer* standard, in order for their conduct to constitute deliberate indifference, the defendants must have not only subjectively perceived the facts from which they could draw an inference that their individual actions would increase the risk of Bradley's suicide, they must also have consciously disregarded that risk.

3. Applying the Standard to the Individual Defendants

As an initial matter, the court notes two points of contention with the district court's analysis. First, the district court based its denial of the defendants' motions for summary judgment almost entirely upon their alleged failure to follow Ferndale's internal procedures regarding the treatment of detainees exhibiting suicidal tendencies. (J.A. at 396-400.) For example, the district court notes that upon labeling Bradley as suicidal, the "defendants did not encourage the prisoner to contact a friend or relative, they did not attempt to contact crisis intervention personnel; they did not remove the mattress, blanket, and other objects from the cell." (J.A. at 397.) The Supreme Court has held, however, that officials

"do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). Officials become liable for damages only to the extent that there is "a clear violation of the statutory rights that give rise to the cause of action for damages." *Davis*, 468 U.S. at 194 n.12. In *Smith v. Freland*, 954 F.2d at 343, 347 (6th Cir. 1992), this court held that under § 1983, "the issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force." *Smith*, 954 F.2d at 347; *See also Washington v. Starke*, 855 F.2d 346, 350 (6th Cir. 1988) (holding that a defendant's entitlement to qualified immunity would not be precluded where the "violation of the intra-departmental regulation would not have given rise to a cause of action for damages under either federal or Michigan law" at the time of violation). In the case at hand, the plaintiff has not shown that the specific violations alleged to have been committed by the defendants -- i.e. failing to provide for 15 minute checks on suicidal prisoners and failing to remove blankets from the cell of suicidal prisoners -- are specifically prohibited by either federal or Michigan law. As noted above, whether or not a defendant acted with deliberate indifference is dependent upon their subjective state of mind. *Farmer*, 511 U.S. at 839. Therefore, the district court erred when it based its denial of the defendant's motion for summary judgment solely upon the defendants' alleged failure to follow Ferndale's internal procedures. Instead, the court must ask whether the plaintiff has provided proof that the defendants subjectively perceived facts from which they could draw an inference that their individual actions would increase the risk of Bradley's suicide, and that they ultimately acted in consciously disregard of that risk. *See Farmer*, 511 U.S. at 837-39.

Next, the court notes that the district court gave considerable weight to the plaintiff's expert's conclusory statements that the defendant's acted with deliberate indifference to Bradley's suicidal tendencies. For example, the district judge noted the expert's opinion that "the egregious act alone of ignoring the policies because of a preoccupation with another is an act of deliberate indifference to Bradley's medical needs."(J.A. at 398.) As noted above, the violation of city policy is not in and of itself a constitutional violation under 42 U.S.C. § 1983. *Smith*, 954 F.2d at 347. Furthermore, as this court noted in *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994), "'deliberate indifference' is a legal term . . . . It is the responsibility of the court, not testifying witnesses, to define legal terms." *Berry*, 25 F.3d at 1353. Therefore, while the expert may give his opinion as to whether the defendant's actions complied with Ferndale's internal procedures, he may not testify that the violations of these policies proved that the defendants acted

with deliberate indifference to Bradley's suicidal tendencies.[3] *See Berry*, 25 F.3d at 1353.

With the above concepts in mind, the court will assess the actions of each individual defendant in order to determine whether they subjectively perceived and disregarded a known risk that Bradley might harm himself.

a. Officer Simpson

Plaintiff contends that Simpson acted with deliberate indifference to Bradley's suicidal tendencies when he gave Bradley the blankets which Bradley later used to hang himself. (Appellee's Brief at 39.) The facts surrounding Simpson's involvement in this case reveal that upon hearing Bradley's statement about the gun, Simpson reported the

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[3] Berry involved another case where the expert made conclusory statements regarding whether the defendants acted with deliberate indifference. *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994). In *Berry*, the court noted that:

> "An expert's opinion may "embrace[] an ultimate issue to be decided by the trier of fact[,]" Fed. R. Evid. 704(a), the issue embraced must be a factual one. The expert can testify, if a proper foundation is laid, that the discipline in the Detroit Police Department was lax. He also could testify regarding what he believed to be the consequences of lax discipline. He may not testify, however, that the lax discipline policies of the Detroit Police Department indicated that the city was deliberately indifferent to the welfare of its citizens.

Berry, 25 F.3d at 1353.

remark to the shift commander in accordance with Ferndale's internal procedures. (J.A. at 51-52.) Although Simpson believed that Bradley had made the remark in jest, he reported it anyway just to be safe. (J.A. at 51.) This led to Bradley being flagged a possible suicide risk. (J.A. at 52.) In accordance with procedure, Simpson removed Bradley's belt, jacket and other personal belongings before giving him two blankets and placing him in his cell. (J.A. at 203.) After placing Bradley in his cell, Simpson went back out on patrol. (J.A. at 52.)

The above facts do not evidence a conscious disregard for Bradley's safety. Upon hearing Bradley's statement, Simpson reported it to his shift commander in accordance with Ferndale's procedure. (J.A. at 51.) While it is true that Simpson gave Bradley the blankets, there is no evidence that he did so knowing that Bradley might attempt to hang himself. In fact, Simpson testified that prior to Bradley's death, he had received no training on how to deal with suicidal prisoners at all. (J.A. at 194.) Finally, the decision to remove the blankets was a decision to be made by the officer in charge, not Simpson. (J.A. at 287-88.) The option for removing blankets from the cells of detainees suspected of harboring suicidal tendencies is found under Section II(B)(4)(g) of Article 7 of Ferndale's Policies and Procedures. (J.A. at 288.) Section II (B)(4) of Article 7 provides that "the duty command officer *may* exercise one of the following alternatives" if his preliminary evaluation indicates a potential suicide. (J.A. at 287.) At no point does the plaintiff argue that Thomson ordered Simpson to remove the blankets from Bradley's cell. Even if the court were to find that Simpson should have known of the risk presented when giving Bradley the blanket, when an official fails to act in the face of an obvious risk of which she should have known but did not, the official has not inflicted punishment in violation of the Eighth Amendment.

See Farmer, 511 U.S. at 837-38. Therefore, the district court erred when it denied Simpson's motion for summary judgment on qualified immunity grounds.

b. Dispatcher White

Plaintiff contends that White exhibited deliberate indifference to Bradley's suicidal tendencies because he left Bradley unsupervised in his cell for 36 minutes while he was busy tending to the barricaded gunman situation. (Appellee's Brief at 39-40.) White's responsibilities as dispatcher required him to monitor the radio and phones and to make regular checks of the detainees held in the station's lockup. (J.A. at 221-22.) White testified that he spent 65 to 75 percent of his time monitoring the radio and phones. (J.A. at 222.) To support this role, six CCTV monitors were located above the dispatcher's desk which allowed the dispatcher to view the interior of each cell. (J.A. at 222.) White testified that he flagged Bradley as being a suicide risk upon hearing his remark. (J.A. at 66.) After Bradley was placed in his cell, White set a timer to remind himself to check on Bradley in one hour. (J.A. at 227.) Upon doing so, White returned to his desk and resumed monitoring the barricaded gunman situation. (J.A. at 229.) At 9:16, 36 minutes after Bradley was placed in his cell, White decided to check on Bradley, at which time he found Bradley lying unconscious on the floor with a blanket tied around his neck. (J.A. at 230.) White noted in his supplemental report that he went to check on Bradley before the hour was up because he was concerned with Bradley's peculiar behavior. (J.A. at 67.) Upon finding Bradley, White called to Thomson, who entered the cell and began to administer CPR. (J.A. at 66-67.)

Again, White's actions, as alleged by the plaintiff, do not support a finding that White acted with conscious disregard of

Bradley's suicidal tendencies. The option of providing for 15 minute checks of detainees suspected of harboring suicidal tendencies is found under Section II(B)(4)(f) of Article 7 of Ferndale's Policies and Procedures. (J.A. at 288.) Section II (B)(4) of Article 7 provides that "the duty command officer *may* exercise one of the following alternatives" if his preliminary evaluation indicates a potential suicide. (J.A. at 287.) Thus, the decision to check on prisoners every 15 minutes was left up to the duty command officer and not the dispatcher, and at no time does the plaintiff allege that White received such an order. Following standard procedure, White set a timer to remind himself to check on Bradley in one hour. (J.A. at 227.) Nonetheless, White decided to check on Bradley 24 minutes early because he was concerned with Bradley's peculiar behavior. (J.A. at 67.) White testified that he received no training regarding Ferndale's policies on interacting with suicidal prisoners. (J.A. at 234.) The plaintiff has provided no evidence suggesting that White believed that Bradley might commit suicide if not checked on earlier. Therefore, the district court should have granted White's motion for summary judgment.

c. Cadet Crouse

The plaintiff next argues that Crouse acted with deliberate indifference to Bradley's suicidal tendencies because he failed to make 15 minute checks on Bradley as is provided for in Ferndale's Policies and Procedures. (Appellee's Brief at 39.) Here, the evidence shows that Crouse was hired as a police intern on October 15, 1999. (J.A. at 245-246.) Crouse testified that his duties as an intern required him to assist the dispatcher and desk officer in the dispatch center. (J.A. at 245.) Crouse testified that this usually entailed answering telephones, dispatching units to police calls and booking and checking on prisoners. (J.A. at 246.) Crouse noted that he

also washed the police cars and picked up the prisoners' meals. (J.A. at 248.) Finally, Crouse noted that, as an intern, he was not to perform a job unless he was specifically instructed to do so. (J.A. at 246.)

On the night of Bradley's suicide, Crouse had been instructed to try and contact the barricaded gunman by telephone.[4] (J.A. at 250-51.) Crouse noted that this was a continuing process as he would let the phone ring until the answering machine picked up, at which time he would hang up and call again. (J.A. at 250-51.) Crouse testified that he was not involved in booking Bradley and that he didn't remember anything from the time Bradley was booked until White checked his cell 36 minutes later. (J.A. at 250, 252.) As Crouse noted in his deposition, he was only responsible for checking on prisoners when he was specifically ordered to do so. (J.A. at 246.) At no point does the plaintiff suggest that Thomson ordered Crouse to cease his attempts to contact the barricaded gunman and check on Bradley. Because the plaintiff has failed to produce any evidence suggesting that Crouse was responsible for checking on Bradley, it cannot be said that his failure to do so constituted a conscious disregard of Bradley's suicidal tendencies. Therefore, the court finds that the district court erred in failing to grant Crouse's motion for summary judgment.

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[4] Captain Collins's deposition further supports Crouse's testimony that he had been assigned to try and make contact with the barricaded gunman on the night of Bradley's suicide. (J.A. at 344.)

d. Lieutenant Thomson

The plaintiff contends that Thomson acted with deliberate indifference to Bradley's suicidal tendencies because he did not see to it that Ferndale's policies were implemented. (Appellee's Brief at 42.) Specifically, the district court held that Thomson's failure to remove the blankets from Bradley's cell and establish 15 minute checks once he suspected that Bradley was suicidal created a genuine issue of material fact as to whether Thomson acted with deliberate indifference. (J.A. at 399-400.)

The record indicates that upon hearing Bradley's remark, Bradley was labeled as a suicide risk and Thomson made provisions to expedite Bradley's transfer to the County Jail. (J.A. at 57.) When the Oakland County Sheriff's Department requested that Bradley's transfer be postponed until the following Monday, "Thomson responded that the transfer would have to be completed that night. (J.A. at 123.) The request itself stated:

> Would normally not have a problem holding until Monday, but htis (sic) prisoner is intoxicated, has Hepatitis C, and is suicidal, and we are in the middle of a barricaded gunman. If possible, we would appreciate it if you would pick him up as soon as you can, as we are very short personnel due to the situation. Please advise us what you are going to do. (J.A. at 123.)

At some point after placing Bradley in his cell, "Thomson looked at the monitors and saw Bradley lying on his bunk with the blankets. (J.A. at 317-18.) Finally, after Thomson learned that Bradley had attempted suicide, he entered

Bradley's cell and, despite knowing that Bradley had Hepatitis C, he began to administer CPR. (J.A. at 67.)

Again, Thomson's actions do not evidence a conscious disregard of Bradley's suicidal tendencies. "Thomson recognized Bradley's condition and made provisions to have him transferred to a facility which was better equipped to provide for his needs. (J.A. at 57.) While removing the blankets and imposing 15 minute checks on Bradley's cell may have succeeded in preventing Bradley from committing suicide, Article 7 of Ferndale's Policies and Procedures does not specifically require these acts. (J.A. at 287-88.) Section II (B)(4) of Article 7 provides that "the duty command officer *may* exercise one of the following alternatives" if his preliminary evaluation indicates a potential suicide. (J.A. at 287-88.) As noted above, when an official fails to act in the face of an obvious risk of which she should have known but did not, the official has not inflicted punishment in violation of the Eighth Amendment. *See Farmer,* 511 U.S. at 837-38. Therefore, the district court erred in denying Thomson's motion for summary judgment.

Finally, because the plaintiff has not established that the above defendants violated Bradley's constitutional rights, there is no need to determine whether the right violated was clearly established.

e. Chief Kitchen

The district court denied Chief Kitchen's motion for summary judgment based on qualified immunity without prejudice because he had not been deposed at that time. (J.A. at 402.) The defendants have not opposed this ruling on appeal. Therefore, whether Chief Kitchen is entitled to qualified immunity is an issue best left for the district court.

B. Plaintiff's State Law Claims Alleging Gross Negligence

1. The Court's Jurisdiction Over Defendants' Appeals

In *Walton v. City of Southfield,* 995 F.2d 1331, 1342-1344 (6th Cir. 1993), this court held that a defendant could not appeal a district court's denial of governmental immunity pursuant to Michigan Compiled Laws § 691.1407 because it was not a "final decision" under 28 U.S.C. § 1291. *Walton,* 995 F.2d at 1344. In its ruling, the court noted that § 691.1407 provided governmental immunity from liability only, not from suit. *Walton,* 995 F.2d at 1344. In a diversity case or a federal question action involving pendent state claims, *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), and *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), dictate that the court must look to state immunity law to determine if a denial of immunity based on state law is appealable. *Walton,* 995 F.2d at 1343. In looking to Michigan law, the court noted that § 691.1407 codified the judicially created governmental immunity doctrine established in *Ross v. Consumers Power Co.,* 420 Mich. 567, 363 N.W.2d 641 (Mich. 1984). In *Reardon v. State,* 430 Mich. 398, 424 N.W.2d 248, 254 (1988), the Michigan Court of Appeals noted that the statute "codified the *Ross* definition practically verbatim," except for abolishing Ross's ministerial versus discretionary test for individual immunity. In *Marrical v. Detroit News, Inc.,* 805 F.2d 169, 172 (6th Cir. 1986), this court noted that:

> Since we find no indication that Michigan's doctrine of absolute or qualified immunity includes a right to be free from the exigencies of trial, we conclude that Michigan law affords no basis for imposing on litigants the burdens of an interlocutory appeal.

The court's decision turned on the fact that the language in *Ross* referred to immunity from liability, and "nowhere included among its reasons for immunizing governmental officials the need to protect against the disruptions of pre-trial proceedings such as discovery or the burdens of trial other than the risk of ultimate liability in damages." *Marrical,* 805 F.2d at 173-74. Indeed, the text of § 691.1407 itself mentions immunity from liability only, not from suit.[5] Mich. Comp. Laws § 691.1407. As the defendants note, however, the June 4, 2002, amendment to Michigan Court Rule 7.202(7)(a)(v) included as a "final order," for purposes of appeal, "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee." Therefore, as the denial of governmental immunity is now a "final order" providing defendants with an appeal of right to the Michigan Court of Appeals, the issue is properly before the court on interlocutory appeal.

2. The Individual Defendants' Entitlement to Governmental Immunity

The court will review a grant or denial of summary judgment *de novo,* using the same Rule 56(c) standard as the district court. *Cox v. Kentucky Department of Transportation,* 53 F.3d 146, 149 (6th Cir.1995) (citing *Hansard v. Barrett,* 980 F.2d 1059 (6th Cir. 1992)). Summary judgment is appropriate where "the pleadings, depositions, answers to

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[5] Mich. Comp. Laws § 691.1407(2) states, in pertinent part:

> Each ... employee of a governmental agency ... shall be immune from tort liability for injuries to persons or damages to property caused by the ... employee ... while in the course of employment ... while acting on behalf of a governmental agency if all of the following are met:

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, we view the factual evidence and draw all reasonable inferences in favor of the non-moving party. *National Enterprises v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). To prevail, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 341-42 (6th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Klepper*, 916 F.2d at 341-42 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The tort liability of governmental employees under Michigan law is governed by the employee provision of the governmental immunity act, which states in pertinent part:

> Each ... employee of a governmental agency ... shall be immune from tort liability for injuries to persons or damages to property caused by the ... employee ... while in the course of employment ... while acting on behalf of a governmental agency if all of the following are met:
> (a) The ... employee ... is acting or reasonably believes he or she is acting within the scope of his or her authority.

> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> (c) The ... employee's ... conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Mich. Comp. Laws § 691.1407(2). The district court held that "the proximate cause issue is for the jury to decide and Plaintiff has submitted sufficient evidence to create a genuine issue of fact as to whether their action or inaction was grossly negligent under the circumstances." (J.A. at 404.) There is no question that (a) and (b) are satisfied in the case at hand. The question is, therefore, whether the defendants' conduct amounted to gross negligence that was the proximate cause of Bradley's death.

In *Robinson v. City of Detroit*, 462 Mich. 439, 613 N.W.2d 307, 317 (Mich. 2000), the Michigan Supreme Court overruled *Dedes v. Asch*, 446 Mich. 99, 521 N.W.2d 488 (Mich. 1994), "to the extent that it interpreted the phrase 'the proximate cause' in subdivision (c) to mean 'a proximate cause.'" The *Robinson* Court reasoned that "the Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause." *Robinson*, 613 N.W.2d at 317. The court ultimately held that "the phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson*, 613 N.W.2d at 317.

In *Kruger v. White Lake Twp.*, 250 Mich. App. 622, 648 N.W.2d 660 (Mich. Ct. App. 2002), the Michigan Court of Appeals applied *Robinson* to a case involving the death of

pretrial detainee. In *Kruger,* the decedent's mother called the White Lake Township Police Department and requested that her daughter, Katherine Kruger, ("Kruger"), be taken into custody. *Kruger,* 648 N.W.2d at 661. Kruger's mother informed the police that Kruger was intoxicated and that she feared that Kruger posed a danger to herself and others. *Kruger,* 648 N.W.2d at 661. Upon arresting Kruger, the officers learned that she had an outstanding warrant issued against her in the Bloomfield Township. *Kruger,* 648 N.W.2d at 661. After Kruger was arrested, the officers transported her to the White Lake Township Police Department to await her transfer to Bloomfield Township. *Kruger,* 648 N.W.2d at 661. Due to a lack of vacant holding cells, Kruger was handcuffed to a ballet bar in the station's booking room. *Kruger,* 648 N.W.2d at 661-62. The officers left Kruger in the booking room unattended, where she was later able to free herself from the handcuffs and escape. *Kruger,* 648 N.W.2d at 662. As she fled from the police station, Kruger ran into traffic and was struck and killed by an unidentified vehicle. *Kruger,* 648 N.W.2d at 662.

Kruger's representative subsequently filed suit alleging gross negligence on the part of the Township and its officers. *Kruger,* 648 N.W.2d at 662. The trial court dismissed Kruger's claim and Kruger appealed. *Kruger,* 648 N.W.2d at 661. Citing the court's holding in *Robinson,* the Michigan Court of Appeals held that, even assuming that the defendants' conduct was grossly negligent, it was not the direct cause of Kruger's death. *Kruger,* 648 N.W.2d at 663. The court noted that the more direct causes of Kruger's death was her escaping from the police station, her running into traffic and her being hit by the car. *Kruger,* 648 N.W.2d at 663.

In an unpublished opinion by the Michigan Court of Appeals, *Scott v. Charter Twp. of Clinton,* No. 233266, 2002 Mich. App. LEXIS 2358, 2002 WL 31160298 (Mich. App. Sept. 27, 2002), the court applied the *Robinson* court's analysis to claims against police officials for failing to prevent an inmate's suicide. In *Scott,* the decedent hung himself with the drawstring of his pants after being arrested for a domestic dispute. *Scott,* 2002 Mich. App. LEXIS 2358, 2002 WL 31160298, at *1. Following Scott's suicide, the plaintiff filed suit against the Township, its police department and several individual officers. *Scott,* 2002 Mich. App. LEXIS 2358, 2002 WL 31160298, at *1. The district court granted summary judgment for the defendants and plaintiff appealed. *Scott,* 2002 Mich. App. LEXIS 2358, 2002 WL 31160298, at *1. On appeal, the plaintiff argued that the trial court erred because it had set forth sufficient facts to show that the officers were grossly negligent for refusing to obtain medical treatment for Scott, for disobeying department policies on how to treat suicidal inmates and for failing to find and remove the drawstring on Scott's pants. *Scott,* 2002 Mich. App. LEXIS 2358, 2002 WL 31160298, at *2-3. Applying the *Robinson* analysis, the court concluded that the one most immediate, efficient, and direct cause preceding his injury was Scott's act of hanging himself. *Scott,* 2002 Mich. App. LEXIS 2358, 2002 WL 31160298, at *3.

Next, in *Soles v. Ingham County,* 316 F.Supp.2d 536 (W.D. Mich. 2004), the personal representative of the deceased inmate filed a complaint alleging that the inmate's suicide was caused by the prison officials' deliberate indifference, gross negligence and negligence. In *Soles,* the decedent, Frayer, was placed in an observation cell because he was known to be suicidal. *Soles,* 316 F. Supp. 2d at 539. Frayer was later returned to the general population after promising a social worker that he would not harm himself.

Soles, 316 F. Supp. 2d at 540. On the evening of Frayer's suicide, one of the guards noticed that Frayer was acting strange and stated that he had a "gut hunch" that the Frayer might try to commit suicide at some point during the night. *Soles*, 316 F. Supp. 2d at 540. The guard did not request that Frayer be returned to an observation cell, and he failed to inform his replacement of his suspicions. *Soles*, 316 F. Supp. 2d at 540. Frayer successfully committed suicide later that night. *Soles*, 316 F. Supp.2d at 540. After his death, Frayer's personal representatives filed suit against the guard and social worker alleging that their actions constituted gross negligence. *Soles*, 316 F. Supp. 2d at 540-41. In granting the defendants' motion for summary judgment, the district court concluded that even if the defendants were deemed responsible for some nonfeasance amounting to gross negligence, liability could be imposed only if such nonfeasance was the proximate cause of Frayer's death. *Soles*, 316 F. Supp. 2d at 546. The court went on to note that it was "undisputed that [Frayer] committed suicide while he was alone in his cell by hanging himself with a bed sheet." *Soles*, 316 F. Supp. 2d at 546. The one most immediate, efficient and direct cause of his death was clearly not any nonfeasance by the defendants, but [Frayer's] own volitional self-destructive act." *Soles*, 316 F. Supp. 2d at 546. When viewed in light of these decisions, it is clear that the one most immediate, efficient and direct cause of Bradley's death was his own act of hanging himself.

Finally, the plaintiffs expert placed the ultimate blame not with the individual officers, but with the City's failure to adequately train its employees. (J.A. at 173-74.) As noted above, the expert concluded that:

> Thomson indeed shoulders some blame for Bradley's death. But Thomson was not prepared to handle a suicide risk. That blame rests with the city and the

> police department. The provision of "hollow" policies without explanation or training to all of the members responsible for prisoners is the overriding reason and moving force behind the deficiencies that allowed Bradley, a known and flagged suicide risk, to complete the act while a TV monitor displayed his actions to otherwise engaged, indifference and untrained employees.

(J.A. at 173-74.) Therefore, as the actions of the individual defendants were not the one most immediate, efficient and direct cause of Bradley's death, the district court erred when it denied defendants Simpson, White, Crouse, Thomson and Chief Kitchen's motions for summary judgment on plaintiff's state law claims.

IV. Conclusion

For the reasons stated above, defendants Simpson, White, Crouse and Thomson are entitled to qualified immunity, and the district court's denial of these defendants' motions for summary judgment on Bradley's 1983 claim is REVERSED and judgment is entered in their favor on those claims. In addition, defendants Simpson, White, Crouse, Thomson and Chief Kitchen are entitled to governmental immunity pursuant to Michigan Compiled Laws § 691.1407(2). Accordingly, the district court's denial of the defendants' motion for summary judgment on Bradley's state law claims is REVERSED and judgment is entered in their favor on those claims. The remaining § 1983 claim against Chief Kitchen, on which the parties did not appeal the denial of summary judgment, is remanded to the district court.

DISSENTBY: DAMON J. KEITH

DAMON J. KEITH, Circuit Judge, concurring in part, dissenting in part.

I concur in the majority's disposition of the claims Bradley has alleged against Dispatcher White, Cadet Crouse, and Chief Kitchen. I, however, am compelled to depart from the majority with regard to Bradley's claims against Officer Simpson and Lieutenant Thomson for acts of deliberate indifference and gross negligence.

I. Deliberate Indifference

A plain application of the deliberate indifference standards in this circuit and by the Supreme Court affirms that Bradley has stated viable claims of deliberate indifference against Officer Simpson and Lieutenant Thomson. As the majority has acknowledged, Majority Op. at 11, the Supreme Court set forth the standard for evaluating claims of deliberate indifference in *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994):

> We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

This circuit has repeatedly taken a two-step approach in applying the standard of *Farmer:* we have required that claims of deliberate indifference satisfy (1) an objective component,

and (2) a subjective component. *Estate of Carter v. City of Detroit*, 408 F.3d 305, 311 (6th Cir. 2005) ("There are two parts to the claim, one objective, one subjective."); *Johnson v. Karnes*, 398 F.3d 868, 874 (6th Cir. 2005) ("A claim for the deprivation of adequate medical care 'has two components, one objective and one subjective.'")(internal citation omitted); *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir. 2004) (same); *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001) (same). Under the objective component, we require a claimant to establish the "existence of a 'sufficiently serious' medical need." *Estate of Carter*, 408 F.3d at 311; *Blackmore*, 390 F.3d at 895 (quoting *Farmer*, 511 U.S. at 834); *Comstock*, 273 F.3d at 703. Under the subjective component, the claimant must show that the defendant possessed "a sufficiently culpable state of mind," *Estate of Carter*, 408 F.3d at 311, such that the defendant knew of but nonetheless disregarded the claimant's serious risk of harm.

In the instant case, the majority concedes, and I agree, that suicidal tendencies constitute a medical need that is sufficiently serious to satisfy the objective component of the deliberate indifference standard. Majority Op. at 9. *See also Comstock*, 273 F.3d at 703 ("We have held that a prisoner's 'psychological needs may constitute serious medical needs, especially when they result in suicidal tendencies.'") (quoting *Horn v. Madison Cty. Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994)).

Having satisfied the objective component, Bradley's claim must also satisfy the subjective component. Inasmuch as I believe that the evidence, viewed in the light most favorable to Bradley, permits a jury to reasonably conclude that Officer Simpson and Lieutenant Thomson both perceived that Bradley posed a serious risk of harm to himself and that they

disregarded that risk, I would hold that Bradley has stated a viable claim of deliberate indifference against those two officials. To meet the subjective component, the evidence must permit a reasonable jury to find that Officer Simpson and Lieutenant Thomson each possessed a "sufficiently culpable state of mind." *Estate of Carter*, 408 F.3d at 312. To do that, Bradley must show that "the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregard that risk." *Comstock*, 273 F.3d at 703 (citing *Farmer*, 511 U.S. at 837). "Deliberate indifference 'entails something more than mere negligence,' but can be 'satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.'" *Blackmore*, 390 F.3d at 895-96 (quoting *Farmer*, 511 U.S. at 835).

In the present case, the evidence established that Officer Simpson and Lieutenant Thomson both witnessed Bradley state that he wanted either to shoot himself or to be shot by a police officer. After hearing the statement, Officer Simpson demonstrated sufficient concern for Bradley's mental state and reported it to Lieutenant Thomson, who had in fact heard the statement himself. Out of concern that Bradley was likely suicidal, Lieutenant Thomson directed that Bradley's prisoner intake file be flagged with a red sticker to indicate he was likely suicidal. Officer Simpson was present at the time and knew that Bradley had been red-flagged as suicidal. In my view, this set of facts, viewed in the light most favorable to Bradley, sufficiently demonstrates that Officer Simpson and

Lieutenant Thomson both perceived that Bradley posed a serious risk of harm to himself.[1]

The evidence, I believe, equally establishes that Officer Simpson and Lieutenant Thomson disregarded that risk. A jury could reasonably conclude that despite having knowledge of the serious risk that Bradley posed to himself, Officer Simpson recklessly disregarded that risk when he gave Bradley two blankets. The majority errs by concluding that "while it is true that Simpson gave Bradley the blankets, there is *no evidence* that he did so knowing that Bradley might attempt to hang himself," Majority Op. at 14 (emphasis added), and that "even if the court were to find that Simpson should have known of the risk presented when giving Bradley the blanket, when an official fails to act in the face of an obvious risk of which she should have known but did not, the official has not inflicted punishment in violation of the Eighth Amendment," *Id.* at 15. These conclusions are in error for two reasons. First, as discussed above, there is evidence that Officer Simpson personally perceived the risk that Bradley "might attempt" to commit suicide. Officer Simpson heard

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[1] Based on Officer Simpson's deposition testimony, the majority asserts that "although Simpson believed that Bradley had made the remark [about shooting himself] in jest, he reported it anyway just to be safe." Majority Op. at 14. Officer Simpson's after-the-fact attempt to discount Bradley's suicidal statement does not square with his actions at the time that the statement was made. At that earlier time, he thought the remark was serious enough that he should report it to his command officer. Moreover, Officer Simpson's belated assessment in this regard merely creates a genuine issue of material fact concerning what he actually perceived, and the majority's reliance on it does not view the evidence in the light most favorable to Bradley.

Bradley make a statement evincing suicidal tendencies, and he considered the statement sufficiently significant that he reported it to Lieutenant Thomson. Officer Simpson also knew that Lieutenant Thompson had decided that Bradley's prisoner intake file should be flagged with a red sticker indicating he was suicidal. Both of these events occurred in Officer Simpson's presence before he gave Bradley two blankets. Thus, there is evidence that Officer Simpson knew Bradley might attempt to harm himself when he gave him the blankets.

Moreover, the majority's holding implies that the standard for a deliberate indifference claim requires Officer Simpson to have known that Bradley would harm himself. That is not the rule. Bradley must show only that Officer Simpson perceived *the risk* and disregarded that risk. Knowledge that harm would result is not required. "[A] plaintiff need not show that the official acted 'for the very purpose of causing harm or with knowledge that harm will result.' . . . Instead, 'deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of *recklessly* disregarding that risk.'" *Comstock*, 273 F.3d at 703 (quoting *Farmer*, 511 U.S. at 835-36) (emphasis added) (internal citation omitted). Viewed in the light most favorable to the non-moving party, the record evidence in this case demonstrates that Officer Simpson recognized the risk and subsequently disregarded it.

Turning to Lieutenant Thomson, the evidence demonstrates that he heard Bradley's suicidal statement, instructed the dispatcher to place a red sticker on Bradley's prisoner intake file, and at some point thereafter saw Bradley in his cell with the blankets. The majority shields Lieutenant Thomson of any liability because he "made provisions to have [Bradley] transferred to a facility which was better equipped to provide for his needs." Majority Op. at 19. In my view,

arranging Bradley's transfer does not absolve Lieutenant Thomson of his obligation to provide for Bradley's medical needs while Bradley remained under his care. As the majority makes clear, Lieutenant Thomson, as the on duty command officer, had a multitude of options at his disposal for dealing with suicidal detainees. *See* Majority Op. at 15, 16, and 19. Yet, after recognizing the risk that Bradley posed to himself, Lieutenant Thomson did nothing.

For the above reasons, I would affirm the district court's denial of summary judgment with regard to Officer Simpson and Lieutenant Thomson.

II. Gross Negligence

Inasmuch as I conclude that a genuine issue of material fact exists as to whether (1) Officer Simpson acted with gross negligence in giving blankets to a detainee who he knew presented a suicidal risk, and (2) Lieutenant Thomson acted with gross negligence because after designating the detainee as suicidal he observed him with blankets but did not monitor him or remove the blankets, I would affirm the decision of the district court. Police officers take prisoners as they find them. Here, Bradley was suicidal. The evidence indicates that the officers knew he was suicidal. Despite this knowledge, Officer Simpson gave him two blankets and Lieutenant Thomson observed him with the blankets but did not remove the blankets or closely monitor Bradley. The police officials did not merely fail to act; rather, their joint actions worsened Bradley's fate. Under these circumstances, I would hold that a jury could reasonably conclude that Officer Simpson and Lieutenant Thomson were "the one most immediate, efficient, and direct cause preceding" Bradley's death. *Robinson v. City of Detroit,* 462 Mich. 439, 613 N.W.2d 307, 317 (Mich. 2000).

None of the cases cited by the majority support its conclusion that Officer Simpson and Lieutenant Thomson cannot be liable for gross negligence resulting in the death of Bradley. This case is not at all like *Kruger v. White Lake Twp.*, 250 Mich. App. 622, 648 N.W.2d 660, 662 (Mich. Ct. App. 2002), in which the plaintiff was left alone in the booking room "and was eventually able to maneuver her way out of the handcuffs and escape. As she fled from the police station, she ran into traffic and was hit by an unidentified vehicle." The present case is equally distinguishable from *Scott v. Charter Twp. of Clinton*, No. 233266, 2002 Mich. App. LEXIS 2358, 2002 WL 31160298 (Mich. Ct. App. Sept. 27, 2002). In that unpublished case, police officers had arrested Scott during a domestic dispute and "Scott committed suicide by hanging himself with the drawstring from his pants." *Id.* Unlike in the present case, *Scott* did not involve the presence of any evidence showing that the officers had determined or even suspected the detainee was suicidal. In addition, Scott killed himself using a drawstring from his own clothing, and not using articles which had been provided by the police.

The majority's reliance on *Soles v. Ingham County*, 316 F. Supp. 2d 536 (W.D. Mich. 2004) is similarly misplaced. In *Soles*, the detainee committed suicide in his cell by hanging himself with his bed sheet. *Id.* at 540. The prison officials in *Soles*, however, had moved the detainee to an observation cell after he reported having suicidal thoughts to a corrections officer, arranged for his immediate evaluation by a mental health worker, transferred him to the psychiatric unit of St. Lawrence Hospital, and returned him to an observation cell upon his release from the hospital psychiatric unit. *Id.* at 539-40. In addition, the detainee underwent multiple therapy sessions with the prison mental health worker and "signed a 'no-harm contract,' agreeing not to harm himself or others

and to notify a deputy if he felt he was going to harm himself or others," *Id.* at 540, all prior to being returned to the general population where he hanged himself. Hence, I am not persuaded that the district court's holding in *Soles* has any applicability to the case pending before this court.

The majority holds that "it is clear that the one most immediate, efficient and direct cause of Bradley's death was his own act of hanging himself." Majority Op. at 26-27. If the majority is right, under Michigan law a detainee's suicide can never result from the gross negligence of police officers because, by definition, every successful suicidal detainee will have died from self-inflicted acts. I, however, have found no case law holding that a detainee's suicide can never result from the gross negligence of police officers. If this were so, it would make no difference whether the officers had supplied this known suicidal detainee with blankets, as they did, or with a noosed rope. After determining Bradley was suicidal, Officer Simpson gave him--and Lieutenant Thomson let him keep--blankets that he used to commit suicide. Under these circumstances, I believe a jury could reasonably conclude that these officers constituted the single most immediate, efficient and direct cause of Bradley's death.

Thus, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case No. 02-CV-73001-DT

[Filed March 16, 2004]

STEPHANIE BRADLEY, Personal Representative of the Estate of Clark Bradley, Deceased, Plaintiff,	)
v.	)
CITY OF FERNDALE, CHIEF KITCHEN, OFFICER PAUL SIMPSON, LIEUTENANT THOMAS J. THOMSON, JAMES L. DYER, DISPATCHER JASON WHITE, and CADET CROUSE, Defendants.	)

HONORABLE DENISE PAGE HOOD

MEMORANDUM OPINION AND ORDER AND NOTICE SETTING STATUS CONFERENCE

I. INTRODUCTION/FACTS

Plaintiff Stephanie Bradley is the personal representative of the decedent Clark Bradley, who was a pretrial detainee with Defendant City of Ferndale. Plaintiff filed a two-count Complaint against Defendants alleging: gross negligence, intentional, willful and wanton misconduct (Count I) and violation of Civil Rights pursuant to 42 U.S.C. § 1983 (Count II).

On January 22, 2000, the decedent was arrested by Defendant Officer Paul Simpson and was brought to the Defendant City of Ferndale Police Department for booking. (Complaint, ¶16) Plaintiff claims Mr. Bradley was suicidal at the time of his arrest and stated to Defendants Simpson, Dispatcher Jason White and Lieutenant Thomas J. Thomson to "just shoot me." (Complaint, ¶17) Defendant White flagged Mr. Bradley's jail card with an orange sticker to indicate he was suicidal. (Complaint, ¶19) Mr. Bradley was in Cell No. 6 with a television monitor giving a clear view into his cell. (Complaint ¶20) Defendant Simpson removed Mr. Bradley's clothing but gave him two blankets. (Complaint, ¶21) Plaintiff claims that despite having knowledge that Mr. Bradley was a suicide risk, Defendants Simpson, White, Thomson and Defendant Cadet Crouse failed to properly monitor Mr. Bradley. (Complaint, ¶22) Mr. Bradley ripped the blankets he was given into strips and hung himself from a light fixture in his cell approximately 36 minutes after he was booked. (Complaint, ¶¶23-24)

Defendants filed Motions for Summary Judgment. Response and reply briefs have been filed.

II. ANALYSIS

A. Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be entered only where "the pleadings, depositions, answers to the interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The presence of factual disputes will preclude granting of summary judgment only if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-2:3. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248.

B. 42 U.S.C. 1983

1. Standard

"To successfully state a claim under 42 U.S.C. § 1983, a Plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law." *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). The following requirements must be met: (1) the conduct at issue must have been under color of state law; (2) the conduct must have caused a deprivation of constitutional rights; and (3) the deprivation must have occurred without due process of law. *Nishiyama v. Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987). As § 1983 is not itself a source of substantive rights, and only a method for vindicating federal rights elsewhere conferred, a plaintiff must set forth specific constitutional grounds for asserting a § 1983 claim. *Graham v. Connor*, 490 U.S. 386, 393-394 (1989); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

An official will not be found personally liable for money damages unless the official's actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known" under the doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The "clearly established" rights allegedly violated by the official cannot be considered at an abstract level, but must be approached at a level of specificity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). A plaintiff must prove two factors to show that a government official is not entitled to qualified immunity from his suit: 1) that the facts as alleged by him show a violation of a constitutional

right; and 2) that such violated right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

If no constitutional right would have been violated, there is no necessity for further inquiries concerning qualified immunity. *Saucier*, 121 S.Ct at 2156. If a violation could be made out, the next step is to determine whether the right was clearly established in light of the specific context of the case, not as a broad general proposition. *Id.* Under the doctrine of qualified immunity, an official will not be found personally liable for money damages unless the official's actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The "clearly established" rights allegedly violated by the official cannot be considered at an abstract level, but must be approached at a level of specificity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. "*Anderson v. Creighton*, 483 U.S. 635, 639 (1987). "Reasonableness" is a question of law to be decided by the trial court. *Jeffers v. Heavrin*, 10 F.3d 380 (6th Cir. 1993).

Under the Eighth Amendment, prison inmates have a right to a certain level of medical care, Deliberate indifference to the serious medical needs of a prisoner violates this Eighth Amendment right by subjecting them to cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Sanderfer v. Nichols*, 62 F.3d 151, 153 (6th Cir. 1995). Pretrial detainees enjoy analogous protection under the Fourteenth Amendment Due Process Clause found under the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994). The standard encompasses two components: objectively, the medical needs must be sufficiently serious,

and subjectively, the state actors involved must have acted in a deliberately indifferent manner. *Hunt v. Reynolds*, 974 F,2d 734, 735 (6th Cir. 1992).

2. Qualified Immunity/Defendants Simpson, White and Crouse

Defendants Simpson, White and Crouse claim that Plaintiff has failed to establish a claim against them for a deprivation of the decedent's constitutional rights under 42 U.S.C. § 1983. Defendants Simpson, White and Crouse admit that the first element of a § 1983 claim has been met-they were acting under the color of state law.

With regard to the second element, Plaintiff's claim is that Defendants exhibited deliberate indifference to Plaintiff decedent's serious medical needs premised on the Fourteenth Amendment. Defendants concede that the Sixth Circuit has held that psychological needs manifesting themselves in suicidal tendencies constitute serious medical needs for purposes of the due process analysis and that the decedent's medical need was "serious." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994). Defendants claim that they did not act with deliberate indifference.

A prison official acts with deliberate indifference when he acts with criminal recklessness. This state of mind requires that the official "consciously disregard a substantial risk of serious harm," *Brooks v. Celeste*, 39 F.3d 125, 128 (6th Cir. 1994); *Gibson v. Foltz*, 963 F.2d 851, 853 (6th Cir. 1992)("Obduracy or wantonness, not inadvertence or good faith error characterizes deliberate indifference.")

Defendant White testified at his deposition that at the time the decedent was at the jail, they were busier than usual

because there was a barricaded gunman on the street of Beaufield Street. (White Dep., p.49) Defendant White testified that he had placed a red sticker on the decedent's jail card to indicate the decedent may be suicidal. (White Dep., pp.36, 82) According to Defendant White, the red sticker means, "We just make every attempt to watch him closer." (White Dep., p.36) Defendant Simpson testified that the labeling of the decedent's card meant that the decedent must be checked every 15 minutes. (Simpson Dep., p.76) Defendant Thomson testified that when he was notified that the decedent was hanging in the cell, he removed the strips of blanket from his neck and immediately started CPR and called EMS. (Thomson Dep., pp. 24-26, 29) Defendant Simpson arrived on the scene with a life support kit and assisted Defendant Thomson with the CPR until the paramedics arrived. (Thomson Dep., p. 25)

Plaintiff claims that Defendants Simpson, White and Crouse were all aware of the decedent's remark to Defendant Simpson that Defendant Simpson should just give decedent the gun so that the decedent could shoot himself (Simpson Dep., pp.31, 36; White Dep., p.37; Crouse Dep., p.38) In spite of this knowledge, Plaintiff claims they failed to follow Ferndale police procedures for suicidal cases. Defendants did not encourage the prisoner to contact a friend or relative, they did not attempt to contact crisis intervention personnel; they did not remove the mattress, blanket, and other objects from his cell. To the contrary, Defendant Simpson gave him the two blankets which the decedent used to hang himself. Defendants White and Crouse did not perform the fifteen minute checks on the decedent that the Ferndale Police Department manual prescribed. Defendant White admitted that he never checked the video monitor of the decedent's cell even though it was right in front of him at his dispatcher's desk. (White Dep., p. 45)

Plaintiff presented the opinion of an expert, Ken Katsaris, who in his report stated that the officers failed to afford the decedent the opportunity to converse with crisis intervention personnel using the desk telephone but instead gave him the blankets in reckless disregard of a known risk of harm to the decedent. "The egregious act alone of ignoring the policies because of a preoccupation with another is an act of deliberate indifference to Bradley's medical needs." (Katsaris Supp. Report, p.6, ¶D3) By their own admissions, these Defendants failed to monitor the decedent, which "was one of the specific reasons Bradley was able to complete his act of suicide." (Katsaris Supp. Report, p.6, ¶D4) Defendant White did not look at the video monitor from 8:40 p.m. to 9:16 p.m., when he finally did a physical check and found the decedent dead. (Katsaris Supp. Report; p. 7, ¶D4)

Plaintiff has submitted sufficient evidence to create a genuine issue of material fact as to whether Defendants acted with deliberate indifference to the decedent's serious medical needs. It is noted Defendants did not set forth any facts regarding Defendant Crouse's actions. Defendants White, Crouse and Simpson knew that the decedent might be suicidal. No one checked on the decedent after he was placed in the cell. The decedent was given blankets despite his known suicidal tendency. These actions may constitute a conscious disregard of the decedent's serious medical needs. Plaintiff has sufficiently stated a constitutional claim against Defendants White, Crouse and Simpson and they are not entitled to qualified immunity.

3. Qualified Immunity/Defendant Thomson

Defendant Thomson, represented by separate counsel since he no longer works for the City of Ferndale, claims that his actions involving the incarceration of the decedent were

not deliberately indifferent to any serious medical need. Plaintiff claims there are genuine issues of material facts as to whether Defendant Thomson's actions were deliberately indifferent.

Defendant Thomson was the officer in charge of the jail facility on the night of the incident. (Thomson Dep., pp.8, 73) Defendant Thomson admits that he heard the comment the decedent made, "Why don't you just shoot me," at his booking. (Thomson Dep., p.17) Defendant Thomson learned that the decedent claimed to have Hepatitis C and possibly tuberculosis. (Thomson Dep., p.18) Based on department rules and regulations, Defendant Thomson ordered Defendant Simpson to place the decedent in the biohazard cell. (Thomson Dep., p.18). Defendant Thomson tagged the decedent as suicidal and had Defendant White send a message to Oakland County to pick the decedent up as soon as possible. (Thomson Dep., pp.20, 42) Defendant Thomson was preoccupied with the ongoing barricaded gunman situation and had no recollection of looking at the monitor other than one time. (Thomson Dep., p.73) Defendant Thomson testified that he had been trained on how to handle suicidal people but that it is difficult to tell whether a person is in fact suicidal. (Thomson Dep., p.41) Defendant Thomson testified that he was aware of the policy that suicidal prisoners are to be checked at the cell every 15 minutes, but stated it had been a long time since he had read the policy. (Thomson Dep. pp.54-55; 72) Defendant Thomson testified that as to Defendant White's testimony that he did not know anything about the 15 minute requirement, Defendant White should have known of the policy because it is in the policy manual and he is responsible for knowing what is in the manual. (Thomson Dep., p.77) Defendant Thomson testified that he saw Defendant Simpson giving the decedent blankets and he never checked on the decedent until he was told the decedent

had hung himself. (Thomson Dep., pp.81-82) Defendant Thomson testified that Chief Kitchen and Captain Collins told him that Defendant Thomson was the one held responsible for the decedent's death. (Thomson Dep., pp.90-91)

For the same reasons set forth above, Plaintiff has submitted sufficient evidence to create a genuine issue of material fact as to whether Defendant Thomson's action or inaction was deliberate indifference to the decedent's serious medical needs. Defendant Thomson is not entitled to qualified immunity.

4. Municipal Liability/Defendant City of Ferndale

In order for a municipality or a supervisor to be liable under section 1983 there must be some personal involvement or evidence that "execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Generally, the doctrine of respondeat superior has no application in a § 1983 claim absent an allegation that the defendants were following the government's policies or customs. *Dunn v. Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982).

Defendants claim that Plaintiff has failed to state a claim against Defendant City of Ferndale under 42 U.S.C. § 1983 because Plaintiff has failed to satisfy the requirements of *Monell* by failing to identify the policy to connect the City itself to the injury incurred and that the injury was incurred because of the execution of the policy. Defendant further claims that Plaintiff conclusorily alleges that the City of Ferndale's policies and failure to train, supervise and discipline caused the constitutional violation. Defendant

argues that the reliance on one single incident to establish policy or inadequate training is insufficient to state a claim against Defendant City of Ferndale.

Defendants claim there is no evidence of inadequate training for the Defendants. Defendant Thomson testified that he has had training as to how to handle people who are suicidal. (Thomson Dep., pp.45-54) Defendant Simpson also testified that he has had training in determining a life threatening emergency and assessing whether there is the need for immediate medical attention. (Simpson Dep, pp.78-82) Defendant White testified that he has been trained in handling prisoners who need medical attention. (White Dep., p.73) As for Defendant Cadet Crouse, he was still in training and under supervision at the time of the incident. (Crouse Dep., pp. 13, 17)

Plaintiff submitted the report of an expert, Mr. Katsaris, who noted the recognized standards of care for lock-ups which require constant monitoring which may be aided by CCTV at least every 4 minutes. (Katsaris Supp. Discl., pp. 6-7, ¶D4) Mr. Katsaris noted that the City of Ferndale does not even provide for the staff to fulfill this level of monitoring, or to fulfill even their own 15 minute checks. (Katsaris Supp. Discl., pp. 6-7, ¶D4) Mr. Katsaris states that the "blame rests with the city and the police department" for "[t]he provision of 'hollow' policies without explanation or training to all of the members responsible for prisoners [which] is the overriding reason and the moving force behind the deficiencies that allowed Bradley, a known and flagged suicide risk, to complete the act while a TV displayed his actions to otherwise engaged, indifferent, and untrained employees." (Katsaris Supp. Dep., pp. 8-9, ¶D6) Plaintiff claims Captain Timothy Collins testified that the City of Ferndale's suicide policy regarding detainees was not

mandatory. (Collins Dep., pp.95-102) Captain Collins testified that not all Ferndale police employees are trained the same way, nor are they all trained to know the same things. (Collins dep., pp.128-129)

Defendants, White, Simpson and Crouse did not testify that they received specific training on how to handle prisoners with suicidal tendencies. Captain Collins testified that the Ferndale Police Department policy on suicidal prisoners was not mandatory but discretionary. Plaintiffs expert testified that the City of Ferndale's training regarding suicides was inadequate. Plaintiff has presented sufficient evidence to create a genuine issue of material fact as to whether the City of Ferndale adequately trained its officers to monitor suicidal detainees.

5. Chief Kitchen

Defendants claim Defendant Chief Kitchen is not liable in his official or individual capacity. Plaintiff concedes that Defendant Chief Kitchen is not liable in his official capacity under § 1983, but argues that he should not be dismissed in his individual capacity because he has not been produced for his deposition. Plaintiff claims that Defendant Chief Kitchen can be held liable in his individual capacity if he "encouraged the specific incident of misconduct or in some other way directly participated in it." *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984).

Defendants in their reply brief did not address the deposition issue with regards to Defendant Chief Kitchen. It is noted that Defendants previously moved to dismiss Defendant Chief Kitchen based on failure to state a claim and the Court denied the motion because no discovery had been taken. Because no discovery had been taken as to Defendant

Chief Kitchen at the time of oral argument for summary judgment, the motion is denied without prejudice.

C. State Law Claim/Gross Negligence

1. Governmental Immunity/City of Ferndale

Defendant City of Ferndale claims that it is absolutely immune from suit based on MCL § 691.1407(1). See *Ross v. Consumers Power Co.*, 420 Mich. 567 (1984). Plaintiff agrees that government agencies are granted broad immunity but under the public building exception, MCL § 692.1406, Defendant City of Ferndale is not immune.

The Michigan Supreme Court has recognized that under the public building exception, a plaintiff may avoid governmental immunity. In a suicide case, courts must examine the intended use and the specific designated purpose of the building or room in order to determine whether a defect exists. *Johnson v. City of Detroit*, 457 Mich. 695, 707-08 (1998). "Thus, while overhead bars in a general holding cell are not a defect, ..., exposed overhead bars might constitute a defect in a cell specifically designed or equipped to prevent suicide by the installation of wire mesh." *Id.* (citations omitted). In *Jackson v. City of Detroit*, 449 Mich. 420 (1995), the Michigan Supreme Court held that a physical feature of a jail cell otherwise benign, which can become part of a plan of one who is desperately driven to self destruction cannot be considered a defect under the public building exception of the governmental immunity statute. *Id.* at 429. Plaintiff concedes that in *Brown v. Genessee County Board of Commissioners (After Remand)*, 464 Mich. 430 (2001), the Michigan Supreme Court held that although a jail is open for use by members of the public, an "inmate" is not a member of the public as contemplated by the Legislature in enacting

the public building exception. Plaintiff argues that because the decedent was a temporary "detainee" as opposed to an "inmate," the public building exception applies in this case. Plaintiff argues that an "inmate" connotes a longer term of confinement than does a "detainee" and that an "inmate" resides" in the public facility on a permanent or at least semi-permanent basis.

The public building exception is not applicable to the decedent because although the decedent was a temporary "detainee," neither was he a member of the public for the purposes of the public building exception. The decedent was not brought to the jail on his own free will. In any event, Plaintiff has not shown that the design of the jail was negligently designed or inadequately maintained. The state law claim of gross negligence against Defendant City of Ferndale is dismissed.

2. Proximate Cause/Defendants Simpson, White Thomson and Crouse

Liability for negligence does not attach unless a plaintiff can show that the injury in question was proximately caused by a defendant's negligence. *Schutte v. Celotex Corp.*, 196 Mich. App. 135, 138 (1992). The individual Defendants claim Plaintiff cannot show proximate cause and that based on governmental immunity, the individual Defendants are not liable to Plaintiff. In response, Plaintiff claims that because the individual Defendants failed to protect a known suicidal detainee from himself, they should not escape liability.

MCL §691.1407 provides statutory governmental immunity to: (1) governmental agencies and officers and employees of governmental agencies (2) engaged in a governmental function (3) if the officers and employees'

conduct do not amount to gross negligence (4) that is the proximate cause of the injury/or damages. MCL §691.1407(1) and (2); §691.1401(f). See *Ross*, 420 Mich. 567; *Rogers v. City of Port Huron*, 833 F.Supp. 1212, 1223 (1993). "Gross negligence" means "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Rogers*, 833 F.Supp. at 1223. In order to prevail, a plaintiff cannot assert that defendant's conduct was "a" proximate cause of the plaintiffs injury, but rather, must establish that defendant's conduct was "the" proximate cause of the injury. *Id.* at 1224. Although a plaintiff's own conduct is the source of a legitimate causation defense, the significance of an intervening cause is generally left to the jury under Michigan law. *Fleck v. Titan Tire*, 177 F.Supp.2d 605, 624 (E.D. Mich. 2001).

Plaintiff claims that proximate cause is a factual issue, which Defendants do not dispute. Because Defendants had knowledge of the decedent's suicidal tendency, their action or inaction may have been "the" proximate of the decedent's death because of the decedent's mental state at that time. Plaintiff may have been unable to help himself and Defendants could have prevented his death. The proximate cause issue is for the jury to decide and Plaintiff has submitted sufficient evidence to create a genuine issue of fact as to whether their action or inaction was grossly negligent under the circumstances.

3. Absolute Immunity Chief Kitchen

Defendants claim Defendant Chief Kitchen is entitled to absolute immunity because he was acting in his executive authority. MCL 691.1407(5); *Ross*, 420 Mich. at 633. It is noted that in a previous brief in response to Defendants' motion to dismiss, Plaintiff agreed that the statute may apply

to Defendant Kitchen. Plaintiff's response brief in this instance, as noted above, indicates that Defendant Chief Kitchen has not been deposed therefore the motion should again be denied.

For the reasons set forth above, because no discovery has been taken as to Defendant Kitchen, there is nothing before the Court to show whether Defendant Chief Kitchen acted in his executive authority or not.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Defendants City of Ferndale, Chief Kitchen, Simpson, White and Crouse's Motion for Summary Judgment (Docket No. 40, filed June 3, 2003) is DENIED, except as to the claim of gross negligence against the City of Ferndale which is GRANTED.

IT IS FURTHER ORDERED that Defendant Thomson's Motion for Summary Judgment (Docket No, 41, filed June 5, 2003) is DENIED.

IT IS FURTHER ORDERED that a Status Conference in this matter is scheduled for

Monday, April 19, 2004, 3:15 p.m.

/s/_____
Denise Page Hood
United States District Judge

Dated: Mar 16, 2004

No. 05-754

IN THE

Supreme Court of the United States

STEPHANIE BRADLEY, Personal Representative
of the Estate of Clark Bradley, Deceased,

Petitioner,

v.

OFFICER PAUL SIMPSON and THOMAS THOMSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PAUL SIMPSON

KAREN M. DALEY
Counsel of Record
T. JOSEPH SEWARD
CUMMINGS, MCCLOREY, DAVIS
& ACHO, P.L.C.
33900 Schoolcraft
Livonia, Michigan 48150
(734) 261-2400

Attorneys for Respondent
Paul Simpson

199310

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

Is the rule affirmed in *Johnson* v. *Jones* – that summary judgment determinations relating to qualified immunity are immediately appealable when they resolve a dispute concerning an issue of law – being inconsistently applied by federal appellate courts?

Is a city police officer entitled to qualified immunity under 42 U.S.C. § 1983, where the facts as alleged by plaintiff fail to establish that the officer acted with deliberate indifference?

Is a city police officer entitled to governmental immunity under Michigan's governmental immunity statute where the officer's conduct was not "the" proximate cause of the decedent's death?

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I

STATEMENT OF THE CASE

This case arises out of the suicide of Clark Bradley while he was in the custody of the Ferndale Police Department. It was alleged that Mr. Bradley was able to commit suicide because the Defendants failed to monitor Mr. Bradley and failed to take steps to keep Mr. Bradley safe.

Petitioner Stephanie Bradley brought this action as the Personal Representative of the Estate of Clark Bradley. Petitioner brought this action under 42 U.S.C. § 1983, alleging that the Respondents exhibited deliberate indifference to Mr. Bradley's serious medical needs in violation of the Fourteenth Amendment and that their actions constituted gross negligence under state law, which was the proximate cause of his injuries.

Defendants City of Ferndale, Chief Kitchen, Dispatcher White, Cadet Crouse and Respondent Officer Simpson filed a Motion for Summary Judgment pursuant to Rule 56(c), asserting theories of qualified immunity, absolute immunity, and governmental immunity. The district court denied the Motion for Summary Judgment, except as to the claim of gross negligence against the City of Ferndale which was granted. The district court determined that the Petitioner had sufficiently stated a constitutional claim against the Respondents and therefore they were not entitled to qualified immunity. The Court also concluded that the Petitioner submitted sufficient evidence to create a genuine issue of fact as to whether the Officers were entitled to governmental immunity under Michigan's Governmental Immunity Act, M.C.L. § 691.1407.

The Sixth Circuit reversed, determining that the district court erred in denying the Officers qualified immunity

because their actions did not evidence a conscious disregard of the decedent's suicidal tendencies. The Court of Appeals also determined that the individual Officers were entitled to governmental immunity under M.C.L. § 691.1407(2) as to the gross negligence claim because the one most immediate, efficient, and direct cause of the decedent's death was his own act of hanging himself, not the Officers' actions.

Petitioner has now filed a Petition for Writ of Certiorari, seeking review of the Sixth Circuit's reversal regarding the claims against Officers Paul Simpson and Thomas Thomson *only*. This Brief in Opposition is filed on behalf of Officer Simpson.

REASONS FOR DENYING THE PETITION

I. The rule affirmed in *Johnson* v. *Jones* is consistently applied in the federal appellate courts.

Petitioner asserts that the case of *Johnson* v. *Jones*, 515 U.S. 304, 115 S. Ct. 2151 (1995), should be reexamined because it is being inconsistently applied by federal appellate courts. Petitioner does not lend any support to this argument, but merely claims that the case "has not provided the circuit courts with a consistent message . . . ." Pet. App. at 14. To the contrary, subsequent to this Court's clarification of *Johnson* in *Behrens* v. *Pelletier*, 516 U.S. 299; 116 S. Ct. 834 (1996), the authorities have consistently allowed an immediate appeal of a district court's order denying summary judgment that is based on qualified immunity and turns on an issue of law. *See Kennedy* v. *Ridgefield City*, 411 F.3d 1134, 1140-41 (9th Cir. 2005); *Moore* v. *Hartman*, 388 F.3d 871, 875-76 (D.C. Cir. 2004); *Rodriguez-Rodriguez* v. *Ortiz-*

Velez, 391 F.3d 36, 40 (1st Cir. 2004); *Cowan* v. *Breen*, 352 F.3d 756, 760-61 (2nd Cir. 2003); *Herts* v. *Smith*, 345 F.3d 581, 585 (8th Cir. 2003); *Brown* v. *Armenti*, 247 F.3d 69, 77 (3rd Cir. 2001); *Frantz* v. *Village of Bradford*, 245 F.3d 869, 872 (6th Cir. 2001).

As a general rule, interlocutory appeals from determinations of qualified immunity are permissible. In *Mitchell* v. *Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985), this Court held that the denial of a defendant's motion for summary judgment is immediately appealable where the defendant is a public official asserting the defense of qualified immunity and the issue appealed concerns whether the facts demonstrated a violation of clearly established law. An exception to this general rule was created in *Johnson* v. *Jones*, 515 U.S. 304; 115 S. Ct. 2151 (1995). In *Johnson*, this Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of facts for trial." *Johnson*, 515 U.S. at 319-20.

In the subsequent case of *Behrens* v. *Pelletier*, 516 U.S. 299; 116 S. Ct. 834 (1996), the Court explained its ruling in *Johnson*:

> Denial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that every such denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they

> happen to arise in a qualified-immunity case . . . . *Johnson* reaffirmed that summary judgment determinations are appealable when they resolve a dispute concerning an "abstract issue of law" relating to qualified immunity . . . typically, the issue whether the federal right allegedly infringed was "clearly established."

Behrens, 516 U.S. at 313.

The Court held in *Behrens*, as it did in the *Johnson* opinion itself, that the legal issue contained in a district court's denial of summary judgment is not insulated from review simply because the district court states in a conclusory fashion that "material issues of fact remain." *Id.* at 312 (internal brackets omitted); *accord Johnson*, 515 U.S. at 319. If a district court does not adequately explain its reasons for denying a motion for summary judgment on the basis of qualified immunity and instead has stated that there are material disputes of fact remaining, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed." *Behrens*, 516 U.S. at 313 (*quoting Johnson*, 515 U.S. at 319). The purpose of that review of the factual record is to determine whether the district court's holding that a given set of facts violates clearly established law is correct, *not* to determine whether the district court properly concluded that an issue of fact is "genuine." *See Johnson*, 515 U.S. at 319. The difference between the two is the difference between a legal question and a factual question.

In the case at bar, the district court's denial of Respondent's summary judgment motion necessarily